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No.

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK R. McCORMICK, as Receiver of the FIRST
NATIONAL BANK OF SALMON, a Corpora-
tion,

Appellant,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE and E. S.
EDWARDS,

Appellees.

Transcript of Record

Filed

FEB 5 - 1916

F. D. Monckton
Clerk

*Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK R. McCORMICK, as Receiver of the FIRST
NATIONAL BANK OF SALMON, a Corpora-
tion,

Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE and E. S.
EDWARDS,

Appellees.

Transcript of Record

*Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

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N. I. Andrews.*

FOURTH AMENDED BILL OF COMPLAINT.

*In the District Court of the United States, in and for
the District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the FIRST
NATIONAL BANK OF SALMON, a Corpora-
tion, *Plaintiff,*

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE and E. S.
EDWARDS, *Defendants.*

IN EQUITY—No.

*To the Honorable, the Judges of the District Court of
the United States, in and for the District of
Idaho:*

Frank R. McCormick, of Cincinnati, and a citizen of the State of Ohio, Receiver of the First National Bank of Salmon, a corporation organized and existing under the National Banking Laws of the United States, and doing business at Salmon, in the County of Lemhi, State of Idaho, by the direction of the Honorable Comptroller of the Currency of the United States, and by leave of the Court in that behalf first had and obtained, brings this fourth amended bill for and on behalf of the said corporation, against Harry G. King, Norman I. Andrews, George Buck, Guy E. Bowerman and E. S. Edwards, citizens of the State of Idaho, and Fred G. Havemann, a citizen of the State of Oregon, and John Lottridge, a citizen of the State of California.

And thereupon your orator complains and says:

I.

That the First National Bank of Salmon is a National Banking corporation, duly organized and existing under the laws of the United States, and as such has at all times since on or about the 13th day of January, 1906, been doing a general banking business at Salmon, in the County of Lemhi, State of Idaho, until on or about the 8th day of June, 1911, when the said bank voluntarily suspended business, and that thereafter, on or about the 8th day of August, 1911, the Honorable Comptroller of the Currency of the United States determined the said bank to be in an insolvent condition, and placed one Harry Yeager, temporarily, in charge thereof as Receiver; and that afterwards, on or about the 11th day of September, 1911, the Honorable Comptroller of the Currency appointed the said Frank R. McCormick as the Receiver for the said bank for the purpose of winding up its affairs, who thereupon duly qualified as such Receiver, and entered upon the discharge of his duties as such, and that the said Frank R. McCormick is now the duly appointed, qualified and acting Receiver for the said First National Bank of Salmon, for such purpose, having full charge of all of the assets and business affairs thereof, under the direction of the Honorable Comptroller of the Currency of the United States.

II.

That the said First National Bank of Salmon was originally organized with a capital stock of twenty-five thousand dollars, divided into 250 shares, of the

par value of One Hundred Dollars each, and that afterwards, on or about the 5th day of February, 1910, the said capital stock was increased to the amount of Fifty Thousand Dollars, divided into 500 shares, of the par or face value of One Hundred Dollars each; that in the course of its business transactions, the directors of the said bank created a surplus fund on the books of the said bank, of the sum of Fifteen Thousand Dollars, at the following times:

One thousand dollars on the 7th day of January, 1908.

Four thousand dollars on the 5th day of January, 1909.

Five thousand dollars on or about the 5th day of February, 1909, and five thousand dollars on or about the 9th day of July, 1910.

III.

That for the purpose of enabling the said bank to pay its debts and obligations, the Honorable Comptroller of the Currency, on or about the 11th day of January, 1912, levied an assessment and requisition upon the shareholders of the said First National Bank of Salmon, to the full face or par value of the shares of stock of the said bank, held by each of the said shareholders respectively, and amounting in all to the sum of Fifty Thousand Dollars, of which amount there has been paid into the hands of the said Receiver, the sum of about Twenty Thousand Dollars, and that owing to the insolvency of a number of the said shareholders, the said Receiver will be

unable to collect approximately the sum of Twenty Thousand Dollars of such assessment, and that, after realizing upon all of the assets of the said bank now available, and applying the same to the debts and obligations thereof, the same will be insufficient to pay all of the debts and obligations thereof, and that a deficiency of approximately the sum of Twenty Thousand Dollars of unpaid obligations will remain.

IV.

That the defendants Harry G. King, Norman I. Andrews and Guy E. Bowerman were duly elected and qualified, and thereupon became duly acting members of the Board of Directors of the said Bank, at the time of its organization, and continued to act as such until the same was placed in the hands of a Receiver; that the said Harry G. King was at all such times the President of the said Bank, except during the year 1908, when he was the Cashier thereof, having the general management thereof; and that the said Norman I. Andrews was the Vice President thereof, from and after the 10th day of January, 1908; that the defendants, George Buck and John Lottridge, were duly elected and qualified and became acting members of the Board of Directors of the said Bank, from and after the 17th day of November, 1909, and continued as such until the failure thereof; that the said John Lottridge was the duly appointed and acting Cashier of the said Bank from and after January 1st, 1910, until June 8, 1911; that the defendant, Frank G. Havemann, was a duly elected, qualified and acting member of

the said Board of Directors from January 18, 1910, until the failure of the said bank, being the assistant cashier during said period; that the defendant, H. S. Edwards, was a duly elected, qualified and acting member of said Board of Directors from May 15, 1906, until January 18, 1910.

V.

That the defendants herein, Harry G. King, Norman I. Andrews, Guy E. Bowerman, Fred G. Havemann, George Buck and John Lottridge, and each of them, during the term of service of each of said defendants as director as aforesaid, knowingly permitted and assented to the making of loans by the officers, agents and servants of the said First National Bank of Salmon far in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby large sums of money belonging to the stock holders and depositors of said bank became wasted and lost. That the respective amounts of said loans, the dates thereof, the persons to whom the same were made, are as follows, to-wit:

(a) On or about the 15th day of February, 1910, the Salmon Lumber Company, a corporation, the shares of which were owned principally by members of the family of said H. G. King, was owing the said First National Bank, on account of an overdraft, the sum of \$1597.92; and on the first day of July, 1910, the said Salmon Lumber Company was indebted to the said First National Bank upon a promissory note theretofore executed, in the sum of \$3500.00; that on said last-named date, there was loaned to

said Salmon Lumber Company by said bank, the further sum of \$2500.00; that thereafter, to-wit, on or about the 2nd day of November, 1910, there was loaned by said First National Bank to the said Salmon Lumber Company, the further sum of \$3500.00; that on the 10th day of December, 1910, there was loaned to the said Salmon Lumber Company, by said First National Bank, the further sum of \$6000.00, and on or about the 4th day of January, 1911, the further sum of \$3000.00.

(b) That on or about the 11th day of July, 1910, there was loaned by the said bank to E. M. Pollard and S. A. Pollard, husband and wife, of Salmon City, Lemhi County, Idaho, the sum of \$7950.00 as evidenced by two promissory notes of that date, one for \$1700.00 and the other \$6250.00.

(c) That for some time immediately prior to January 2, 1911, one Harry Brown was permitted and allowed to overdraw at said bank in various large amounts, to cover which said overdrafts said Brown, from time to time, executed his promissory notes; that on said date there was owing by said Brown, on such notes and on the overdraft existing on said date, the total sum of \$12,750.00, for which said Brown, on said date, executed and delivered his two certain promissory notes for \$6250.00 and \$6500.00, respectively.

VI.

That the said loans so made as aforesaid to the Salmon Lumber Company, F. M. Pollard and S. A.

Pollard and Harry Brown were each and all in excess of one-tenth part of the capital stock of the said bank actually paid in and were each and all in violation of Section 5200 of the Revised Statutes of the United States; that at the time said loans were made, as aforesaid, the said defendant Harry G. King was the duly elected and acting President of said bank, the said defendant Norman I. Andrews the duly elected and acting Vice President, and the said defendant John Lottridge the duly elected Cashier thereof, and with the said defendants Guy E. Bowerman, George Buck and Fred G. Havemann constituted the Board of Directors of said bank. That at the meeting of the Board of Directors held on the 18th day of January, 1910, Section 34 of the by-laws of said bank was by resolution duly passed, amended to read as follows:

“The Board of Directors of the bank shall at each monthly meeting or oftener examine and approve all loans and discounts and such approval shall be recorded in a book kept for that purpose.” And plaintiff alleges that at each and all of the regular meetings of the said Board of Directors which were held monthly between the said 18th day of January, 1910, and the 1st day of March, 1911, between which said dates the said excessive loans were made as aforesaid, each and all of said defendants Harry G. King, Norman I. Andrews, George Buck, Fred G. Havemann and John Lottridge attended the said meetings of the said Board of Directors and each month personally passed upon and knowingly approved each monthly statement of loans which dur-

ing the month covered by each of said statements had been made by said bank through the said Harry G. King, President; Norman I. Andrews, Vice-President, and John Lottridge, Cashier, who during said period were charged with the management and conduct of its affairs, and plaintiff is informed and believes and upon information and belief alleges that as to the said excessive loans so made to said Salmon Lumber Company, as aforesaid, the said defendant Norman I. Andrews, George Buck and Fred G. Havemann well knew at the time said loans were made of the interest held, owned and possessed by said defendant King and the members of his family in the said Salmon Lumber Company, and that said defendants, and each of them, well knew at the time said loans were made that the said Salmon Lumber Company was doing business with said First National Bank, and that the said defendants Harry G. King and John Lottridge were making the said excessive loans to said Salmon Lumber Company, and carelessly, negligently, wilfully and knowingly permitted and allowed the said King and Lottridge to make said illegal loans whereby the funds of said bank became lost as hereinafter alleged; that as to the said loans so made, as aforesaid, to the said F. M. Pollard and S. A. Pollard and to the said Harry Brown, plaintiff alleges that the same were made for said bank by said Harry G. King and said John Lottridge, then President and Cashier respectively of said bank, and that the said defendants Norman I. Andrews, George Buck and Fred G. Havemann well knew that

said excessive loans were being made, and carelessly, negligently, knowingly and wilfully permitted and allowed the same to be made, whereby the funds of said bank became lost as hereinafter alleged.

VII.

Plaintiff further alleges that the said defendant Guy E. Bowerman, notwithstanding the fact that he was from the time of the organization of said bank on the 13th day of January, 1906, until the 8th day of June, 1911, when the said bank suspended business, a duly elected, qualified and acting member of the Board of Directors of said bank, and notwithstanding his oath as such director that he would diligently and honestly manage the affairs of said bank and would not willingly permit to be violated any of the provisions of the law relating to the conduct thereof, carelessly, wilfully and negligently failed and neglected to attend any meeting of the Board of Directors of said bank during the entire period of his incumbency as a director, and wilfully, carelessly and negligently failed during said entire period to discharge his duties and obligations as a member of the Board of Directors of said bank in examining into and keeping well informed concerning its affairs and particularly the loans which were being made by said bank and wilfully, carelessly and negligently during said period failed to exercise proper or any supervisory authority as such director over said bank's affairs, but to the contrary the said Guy E. Bowerman, during the period when the affairs of said bank were being grossly mismanaged and par-

ticularly during the period when the said excessive loans were made, as aforesaid, with knowledge from the published statements of said bank required to be furnished by the Comptroller of the Currency and from other sources, that the affairs of said bank were being grossly mismanaged and that excessive and illegal loans were being made, carelessly, negligently and wilfully permitted and allowed the said King and Lottridge to make such loans and particularly the loans to the said Salmon Lumber Company, F. M. Pollard, S. A. Pollard and Harry Brown, as hereinbefore set forth, whereby the funds of said bank became lost as hereinafter set forth.

VIII.

Plaintiff alleges that the said Salmon Lumber Company, during the time said excessive loans were being made to it, became insolvent and was thereafter compelled to suspend business with assets insufficient to satisfy and discharge its liabilities, and that no part of the monies so loaned by said bank to said lumber company have ever been repaid to said bank, except the sum of \$2360.00, paid on the day of 19 . . . , which was credited on the said loan of July 27, 1910, and the further sum of \$1500.00, which has been paid to this plaintiff by the trustee of said Salmon Lumber Company, and a loss will result to said First National Bank on account of said loans of approximately \$10,000.00.

That no part of the said \$7950.00 loaned to the said F. M. Pollard and S. A. Pollard was ever repaid by them to said bank, and that although judgment

has been recovered on said notes so executed by said Pollards the same remains unsatisfied except for a credit of \$150.00 for a lot purchased by this plaintiff for his said trust upon execution and order of sale under said judgment, and plaintiff alleges that the balance of the money so loaned to said Pollards will be lost to said bank.

That the said Harry Brown is insolvent and although he has turned over to this plaintiff all his available assets, not more than approximately \$2000.00 will be realized therefrom and the balance of said excessive loans so made to him as aforesaid will be lost to said bank.

IX.

This plaintiff further alleges that said bank did a large and profitable business after its organization until the close of the year 1909, and the affairs thereof were in a fairly prosperous condition until the beginning of that year when the then Board of Directors, among whom were the defendants Harry G. King, Norman I. Andrews, E. S. Edwards, and Guy E. Bowerman entered upon a careless and negligent management of the affairs of said bank, and on or about the month of March, 1909, said Board of Directors without protest from and with the knowledge of said Harry G. King, Norman I. Andrews, E. S. Edwards and Guy E. Bowerman negligently and carelessly and without due or any regard to the rights of the stockholders of said First National Bank of Salmon purchased all the assets of a rival bank in said town of Salmon,

the bank of Langsdorf & Company, paying therefor the sum of \$14,500.00 over and above the par or face value of the assets thereof, and also \$14,500.00 over and above the true value of the assets of said bank, all of which was at the time of said purchase well known to the said defendants Harry G. King, Norman I. Andrews, E. S. Edwards and Guy E. Bowerman, or should have been known to said named defendants if they had used proper or any care or diligence in determining the value of said assets at the time of said purchase, and by reason of the negligence and carelessness of said defendants in not ascertaining the true value of said assets, and in paying therefor out of the funds of said First National Bank of Salmon the sum of \$14,500.00 in excess of the true value thereof, the money of the stockholders of said First National Bank of Salmon became thereby lost and negligently wasted to approximately the sum of \$14,500.00.

X.

Plaintiff further alleges that the said defendants Harry G. King, Norman I. Andrews, George Buck, Guy E. Bowerman, Fred G. Havemann and John Lottridge during their respective terms of office as hereinbefore set forth, wilfully, carelessly and negligently failed to properly manage and conduct the affairs of said bank and wilfully and carelessly allowed the same to be grossly mismanaged whereby the assets thereof were wasted and lost; that between the 1st day of January, 1910, until the failure of said bank on the 8th day of June, 1911, the said defend-

ants Harry G. King as President, and John Lottridge as Cashier, who, subject to the authority of the said Board of Directors, were operating said bank and conducting its affairs, wilfully, carelessly and negligently loaned the funds of said bank to various persons and companies upon insufficient or no security and to various other persons and companies not having sufficient assets with which to repay the same whereby large sums of money belonging to stockholders and depositors of said bank became lost and wasted; that said defendants King and Lottridge as President and Cashier respectively, of said bank during the time aforesaid, carelessly, negligently and wilfully made large loans of the funds of said bank to officers thereof and to companies in which some of said officers were interested, which said loans so made were far in excess of any amount justified by the financial standing of the persons and companies to whom said loans were made and carelessly and negligently and wilfully and in direct violation of the by-laws of said bank permitted the money and funds of said bank to be paid out upon checks and orders of various persons and companies that did not have sufficient or any funds on deposit therein with which to pay such checks and orders whereby large sums of money of said stockholders and depositors became wasted and lost. That by way of particularity as to certain of the numerous acts of gross mismanagement hereinbefore referred to plaintiff alleges:

(a) That on the 11th day of July, 1910, there was loaned by said bank to F. M. Pollard and S. A.

Pollard, husband and wife, of Salmon City, Lemhi County, Idaho, the sum of \$7950.00 as evidenced by two notes of that date payable to said bank, one for \$1700.00 and the other for \$6250.00, which money has never been repaid by said Pollards or either of them; that at the time said loans were made the financial standing of said Pollards would not justify the making of said loans, or either of them, and said loans were wilfully, carelessly and negligently made without sufficient or any security, and plaintiff alleges that although judgment has been recovered upon said notes, upon execution and order of sale thereunder, only \$150.00 has been or can be realized to apply upon said judgment, which said amount is the value of one lot purchased by this plaintiff for his said trust, and the balance of the money so loaned is, according to information and belief of this plaintiff, a total loss. Plaintiff alleges that the said loan is the same loan mentioned in paragraph V hereof as being in excess of the amount allowed to be loaned under the provisions of Section 5200 of the Revised Statutes of the United States.

(b) That on or about the 15th day of February, 1910, the Salmon Lumber Company, a corporation, the shares of which were owned principally by members of the family of said H. G. King, was owing the said First National Bank, on account of an overdraft, the sum of \$1597.92, and on the first day of July, 1910, the said Salmon Lumber Company was indebted to the said First National Bank upon a promissory note theretofore executed, in the sum of

\$3500.00; that on said last-named date, there was loaned to said Salmon Lumber Company by said bank the further sum of \$2500.00; that thereafter, to-wit, on or about the 2nd day of November, 1910, there was loaned by said First National Bank to the said Salmon Lumber Company, the further sum of \$3500.00; that on the 10th day of December, 1910, there was loaned to the said Salmon Lumber Company by said First National Bank, the further sum of \$6000.00, and on or about the 4th day of January, 1911, the further sum of \$3000.00; that all of said obligations of said Salmon Lumber Company remain unpaid except the sum of \$2360.80, which was credited on the said loan of July 27, 1910, and the further sum of \$1500.00, which has been paid to this plaintiff by the trustee of the Salmon Lumber Company. That at the time said loans were made the financial standing of said Lumber Company would not justify the making of said loans or any of them, and that the same were wilfully, carelessly and negligently made without sufficient or any security, and that said Salmon Lumber Company became insolvent during the period when said loans were being made to it, and was afterwards compelled to suspend business, leaving assets insufficient to settle its liabilities, and plaintiff alleges that there will be a loss to said bank on account of said loans of approximately \$10,000.00. Plaintiff alleges that said loans are the same loans mentioned in paragraph V hereof and there alleged to have been in excess of the amount allowed to be loaned under

the provisions of the Section 5200, Revised Statutes of the United States.

(c) That for some time immediately prior to January 2, 1911, one Harry Brown was permitted and allowed to overdraw at said bank in various large amounts to cover which said overdrafts said Brown, from time to time, executed his promissory notes; that on said date there was owing by said Brown on such notes and on the overdraft existing on said date, the total sum of \$12,750.00, for which said Brown on said date executed and delivered his two certain promissory notes for \$6250.00 and \$6500.00 respectively; that at the times said overdrafts were allowed and said loans made as aforesaid, the financial standing and credit of the said Harry Brown would not justify the making of said loans, or any of them, and that the same were wilfully, carelessly and negligently made, without sufficient or any security; that the said Harry Brown is insolvent and although he has turned over to this plaintiff all his available assets there will not be realized therefrom more than the sum of \$2000.00, and the balance of the loans so made to Harry Brown will result in a total loss to said bank. Said loans are the same loans mentioned in paragraph V hereof and therein alleged to be in violation of Section 5200, Revised Statutes of the United States.

XI.

Plaintiff further alleges that at the times when said loans were made as set forth in paragraph V hereof, the said defendants Norman I. Andrews,

George Buck and Fred G. Havemann well knew of the making of said loans and of the financial standing and responsibility of the persons and companies to whom the same were made and plaintiff further alleges that said defendants and each of them without regard to their oath as directors of said bank that they would diligently and honestly manage the affairs thereof, and would not willingly permit to be violated any of the provisions of law relating to the conduct thereof and without exercising proper or any supervisory authority over said bank's affairs, wilfully, carelessly and negligently permitted and allowed said loans to be made and at the monthly meetings of the Board of Directors of said bank held during the period within which said loans were made, passed upon, approved and ratified said loans so carelessly and negligently made as aforesaid by the said Harry G. King, President, and the said John Lottridge, Cashier of said bank. And plaintiff further alleges that the said defendant Guy E. Bowerman, notwithstanding he was duly elected, qualified and acting director of said bank from the organization thereof on the 13th day of January, 1906, until the failure of said bank on the 8th day of June, 1911, wilfully, carelessly and negligently failed and neglected to attend any of the meetings of the Board of Directors of said bank and negligently, carelessly and wilfully failed during the time when such wrongful acts were committed to examine the books and records of said bank to ascertain said bank's condition, and to ascertain the amount of overdrafts and loans allowed and

made to various patrons of said bank, and wilfully, carelessly and negligently failed during the long period when such mismanagement was going on to exercise as such director proper or any supervisory authority over said bank's affairs, whereby said loss might and could have been prevented and avoided, but to the contrary and with knowledge that the affairs of said bank were being grossly mismanaged and with knowledge that excessive and illegal loans were being made to various persons and companies without regard to his oath as such director that he would diligently and honestly manage the affairs of said bank, and would not willingly permit to be violated any provisions of law relating to the conduct thereof, carelessly, negligently and wilfully permitted and allowed said King and Lottridge to make said excessive and illegal loans as hereinbefore set forth, whereby the funds belonging to the stockholders and depositors of said bank became lost and wasted as aforesaid.

XII.

That on the 9th day of July, 1910, owing to the careless and negligent conduct and wrongful and illegal acts as hereinbefore set forth of the defendants during their terms of office respectively, the capital and surplus of said bank had become much impaired and the value of the assets thereof greatly depreciated, but notwithstanding such fact the said defendants Harry G. King, Norman I. Andrews, George Buck, Fred G. Havemann and John Lottridge at said time wrongfully, knowingly and wilfully assented to

the declaring of a dividend out of the available assets of said bank of the sum of \$2500.00, and paid the same to the stockholders thereof including their proportionate share to each of said defendants, and the said defendants further in violation of law knowingly and carelessly and negligently permitted and assented to the carrying of the sum of \$5000.00 to the surplus account of said bank, thus showing on the said books the right to make loans in excess of the amount which could have been legally loaned had the books shown the true condition of the affairs of said bank. Plaintiff alleges that although the said defendant Guy E. Bowerman was not present at the meeting of the Board of Directors at which the said dividend was declared and the said \$5000.00 carried to the surplus account of said bank, he, the said Guy E. Bowerman, wilfully and knowingly accepted his proportion of said dividend, and with knowledge that the said bank was being mismanaged, and that large and excessive loans were being made, in violation of his oath as such director, and without exercising proper or any supervisory control over the affairs of said bank, which as director he was duty bound to do, he, the said Guy E. Bowerman, wilfully, carelessly and negligently permitted the said dividend to be declared and the said \$5000.00 to be carried to the surplus account of said bank as hereinbefore alleged.

XIII.

That at the time of the closing of said bank the said defendants during their respective terms of of-

fice, as aforesaid, in violation of the by-laws of said bank, and in violation of their duties as directors of said banking association, had carelessly and negligently by failing to supervise the affairs of said bank, permitted to be paid checks and orders drawn on said bank of persons and companies not having any funds on deposit therein with which to pay the same to the extent of \$9,800; and that many of the persons who made such overdrafts were insolvent, and have been and now are unable to repay the money so drawn out, and as a result thereof a large amount of the money so paid out will be lost to the said bank. That the names of the persons and companies having no funds in said bank and upon whose orders and checks payments of money were made, together with a statement of condition of the respective accounts of said persons at the dates when such payments were made are fully set forth in plaintiff's Exhibit "A," attached to the original bill of complaint on file herein and hereby referred to, and made a part hereof, and plaintiff alleges that no payments have been made by said persons or companies to said bank or to this plaintiff as receiver except as appears in the said "Exhibit A"; that if said defendants had performed their duties as directors and supervised the affairs of said bank, they would have known that said overdrafts were being permitted and would have stopped the same, and said losses would not have occurred.

XIV.

That the losses which will result to the said bank on account of the said excess loans, will reach the probable amount of Twenty-five to Thirty Thousand Dollars; and that the losses which will result thereto from the said overdrafts will reach the probable amount of Four Thousand Dollars or more; and that the losses which will result thereto from the declaration of the said illegal dividend will reach the amount of Two Thousand Five Hundred Dollars; and that all such losses are directly caused by the careless and negligent handling of the funds, the mismanagement of the affairs of the said bank, and the wilful neglect of said defendants as directors of said institution as hereinbefore particularly set forth.

XV.

That your orator has not any plain, adequate and complete remedy at law.

Wherefore, your orator prays that your Honorable Court may take an accounting of the affairs of the said First National Bank of Salmon, and of the actions and conduct of its said Board of Directors in connection with the matters and things hereinbefore recited, and determine the liability of the respective defendants therefor; that, after having determined such liability, a judgment may be entered against the said defendants respectively, according to such respective liability, require them, the said defendants, to return the money so carelessly and negligently wasted and lost, and so illegally received by

them, and for such other general relief as may to your honorable Court be deemed just and equitable.

F. J. COWEN,

Residing at Salmon, Idaho.

D. WORTH CLARK,

JESSE R. S. BUDGE,

Residing at Pocatello, Idaho.

Counsel for Complainant.

State of Nebraska,

County of Clay.—ss.

Frank R. McCormick, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing action; that he has read the foregoing bill and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be upon information or belief and as to those matters he believes it to be true.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 21st day of March, 1914.

(Seal)

Notary Public.

My commission expires November 25, 1919.

EXHIBIT "A."

GEORGE W. BARFIELD.

	Checks.	Balance.	Overdraft.
March 15, 1911..		\$306.50	
March 22, 1911..	\$301.00		
March 22, 1911..	15.00	316.00	\$ 9.50
March 27, 1911..	5.00	5.00	14.50

FRED BROUGH.

	Checks.	Balance.	Overdraft.
May 17, 1911.....		\$122.81	
June 6, 1911....	\$175.00	\$175.00	\$52.19
Paid since bank closed, \$27.19.			

HARRY BROWN.

	Checks.	Balance.	Overdraft.
Feb. 2, 1911.....		\$000.00	
March 29, 1911..	\$ 10.00		\$ 10.00
May 6, 1911.....	110.00		110.00
Paid since bank closed, \$99.75.			

C. F. HANMER.

	Checks.	Balance.	Overdraft.
May 27, 1911....		\$21.38	
June 2, 1911....	\$100.00	\$100.00	\$78.62
June 6, 1911....	25.00		
June 6, 1911....	23.50	48.50	127.12

J. L. HARMON.

Jan. 7, 1911....	\$7.00		\$7.00
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HENDERSON & KENT.

	Checks.	Balance.	Overdraft.
June 25, 1910...		\$11.08	
July 2, 1910....	\$13.71		\$ 2.63
July 28, 1910....	9.95	43.66	12.58

IDAHO COAL & LAND COMPANY.

	Checks.	Balance.	Overdraft.
June 23, 1910....		\$8.52	
June 30, 1910....	\$11.25		\$ 2.73
July 26, 1910....	10.85		13.58

30 *Frank R. McCormick, Receiver, etc., vs.*

	Checks.	Balance.	Overdraft.
Aug. 3, 1910.....	5.15	.....	18.73
Nov. 3, 1910.....	195.36	.....	214.09
Dec. 5, 1910.....	31.50	.....	245.59
Dec. 29, 1910....	4.25	.....	249.84
March 23, 1911..	1.50	.....	251.34
April 29, 1911...	10.00	.....	261.34

L. L. KENT.

	Checks.	Balance.	Overdraft.
May 21, 1910....	.....	\$28.19	.....
May 23, 1910....	\$65.65	.....	\$37.46

H. G. KING.

	Checks.	Deposits.	Balance.	O'draft.
Nov. 2, 1910...	.....	.....	\$124.78	.....
Nov. 4, 1910...	\$350.00	.....	.....	\$ 225.22
Nov. 12, 1910..	500.00	.....	.....	725.22
Nov. 14, 1910..	47.15	.....	.....	772.37
Nov. 17, 1910..	3.24	.....	.....	775.61
Nov. 18, 1910..	24.00	.....	.....	799.61
Nov. 22, 1910..	15.55	.....	.....	815.16
Nov. 23, 1910..	6.00	.....	.....	821.16
Nov. 28, 1910..	.....	200.00	.....	621.16
Nov. 29, 1910..	24.50	.....	.....	645.66
Dec. 5, 1910...	622.25	320.00	.....	947.66
	.....	15.00	.....	932.66
Dec. 6, 1910...	15.00	.....	.....	947.66
Dec. 7, 1910...	3.50	.....	.....	951.16
Dec. 8, 1910...	352.00	.....	.....	1303.16
Dec. 12, 1910..	.....	34.85	.....	1268.31
Dec. 17, 1910..	3.40	.....	.....	1271.71

	Checks.	Deposits.	Balance.	O'draft.
Dec. 21, 1910..	12.75	.....	.....	1284.46
Dec. 23, 1910..	3.00	.....	.....	1287.46
Dec. 27, 1910..	8.50	.....	.....	1295.96
Dec. 28, 1910..	.....	200.00	.....	1095.96
Dec. 29, 1910..	10.00	.....	.....	1105.96
	10.00	.....	.....	1115.96
Dec. 30, 1910..	35.00	.....	.....	1150.96
Jan. 3, 1911...	36.00	.....	.....	1186.96
Jan. 4, 1911...	24.50	.....	.....	1211.46
Jan. 5, 1911...	11.25	.....	.....	1222.71
Jan. 7, 1911...	3.00	.....	.....	1225.71
Jan. 9, 1911...	2.00	.....	.....	1227.71
Jan. 10, 1911..	88.15	.....	.....	1315.86
Jan. 11, 1911..	2.25	.....	.....	1318.11
Jan. 14, 1911..	9.18	.....	.....	1327.29
Jan. 16, 1911..	9.20	.....	.....	1336.49
Jan. 23, 1911..	.....	50.00	.....	1286.49
Jan. 26, 1911..	24.50	.....	.....	1310.99
Jan. 28, 1911..	11.00	.....	.....	1321.99
Jan. 31, 1911..	.....	225.00	.....	1096.99
Feb. 2, 1911...	30.00	.....	.....	1126.99
Feb. 6, 1911...	5.75	.....	.....	1132.74
Feb. 7, 1911...	.....	47.80	.....	1084.94
Feb. 10, 1911..	10.00	.....	.....	1094.94
Feb. 11, 1911..	3.50	.....	.....	1098.44
Feb. 13, 1911..	208.75	.....	.....	1307.19
Feb. 16, 1911..	17.00	.....	.....	1324.19
Feb. 17, 1911..	.....	203.94	.....	1120.25
Feb. 18, 1911..	464.85	.....	.....	1585.10
Feb. 20, 1911..	3.50	.....	.....	1588.60

	Checks.	Deposits.	Balance.	O'draft.
Feb. 21, 1911..	22.25	.....	.....	1610.85
Feb. 23, 1911..	208.00	.....	.....	1818.85
Feb. 25, 1911..	3.50	.....	.....	1822.35
Feb. 27, 1911..	.....	225.00	.....	1597.35
Feb. 28, 1911..	34.25	.....	.....	1631.60
March 3, 1911.	2.25	.....	.....	1633.85
March 4, 1911.	76.00	.....	.....	1709.85
March 6, 1911.	19.00	.....	.....	1728.85
March 14, 1911	50.00	15.00	.....	1763.85
March 15, 1911	15.00	.....	.....	1778.85
March 17, 1911	50.00	.....	.....	1828.85
March 18, 1911	.60	.....	.....	1829.45
March 20, 1911	2.25	.....	.....	1831.70
March 23, 1911	51.00	.....	.....	1882.70
March 27, 1911	32.60	.....	.....	1915.30
March 31, 1911	450.05	225.00	.....	2140.35
March 31, 1911	.....	1000.00	.....	1140.35
April 4, 1911..	5.00	.....	.....	1145.35
April 5, 1911..	2.00	.....	.....	1147.35
April 10, 1911..	.....	25.00	.....	1122.35
April 13, 1911..	53.00	.....	.....	1175.35
April 15, 1911..	2.25	.....	.....	1177.60
April 17, 1911..	3.00	.....	.....	1180.60
April 19, 1911..	2.10	.....	.....	1182.70
April 20, 1911..	36.50	.....	.....	1219.20
April 21, 1911..	25.70	.....	.....	1244.90
April 22, 1911..	15.00	.....	.....	1259.90
April 25, 1911..	1.00	.....	.....	1260.90
April 29, 1911..	170.65	225.00	.....	1206.55
May 1, 1911...	17.85	.....	.....	1224.40

	Checks.	Deposits.	Balance.	O'draft.
May 3, 1911...	10.00	.....	.....	1234.40
May 4, 1911...	25.00	250.00	.....	1009.40
May 5, 1911...	1.00	.....	.....	1010.40
May 6, 1911...	6.50	.....	.....	1016.90
May 9, 1911...	.....	500.00	.....	.....
	.....	100.00	.....	416.90
May 10, 1911..	255.00	.....	.....	671.90
May 13, 1911..	5.00	.....	.....	676.90
May 15, 1911..	.....	400.00	.....	276.90
May 17, 1911..	100.00	.....	.....	376.90
May 18, 1911..	170.57	.....	.....	547.47
May 19, 1911..	25.00	.....	.....	572.47
May 31, 1911..	12.00	225.00	.....	359.47
June 2, 1911...	4.00	.....	.....	363.47
June 5, 1911...	225.45	.....	.....	588.92

GEO. LEABO.

	Checks.	Deposits.	Balance.	O'draft.
Nov. 3, 1910...	.....	.....	.....	.....
Nov. 28, 1910..	521.00	.....	.....	521.00
Feb. 2, 1911...	.....	487.20	.....	33.80

JOHN LOTTRIDGE.

	Checks.	Deposits.	Balance.	O'draft.
June 2, 1911...	.....	.....	\$41.99	.....
June 2, 1911...	\$150.00	.....	.....	\$108.01
June 5, 1911...	5.00	.....	.....	113.01
June 7, 1911...	451.39	.....	.....	564.40
Paid, 10-4-11, \$110.78; 1-9-13, \$74.50.				

ALLEN C. MERRITT.

	Checks.	Deposits.	Balance.	O'draft.
March 18, 1910			\$7.22	
March 22, 1910	\$12.50			\$5.28
March 25, 1910	750.00			755.28
March 28, 1910	21.00			776.28
April 5, 1910..	10.00	\$140.00		646.28
April 6, 1910..	100.00			746.28
April 9, 1910..	20.50			766.78
April 21, 1910..	12.50			779.28
April 30, 1910..	1.00			780.28
May 2, 1910...		60.00		720.28
May 4, 1910...	30.00			750.28
May 7, 1910...	10.00			760.28
May 9, 1910...	27.00			787.28
May 11, 1910..	10.00			797.28
May 21, 1910..	12.50			809.78
June 22, 1910..	12.50			822.28
June 30, 1910..	36.45			858.73
July 26, 1910..	12.50			871.23
August 22, 1910	12.50			883.73
Sept. 21, 1910..	12.50			896.23
Oct. 22, 1910...	12.50			908.73
Nov. 29, 1910..	12.50			921.23
Dec. 29, 1910..	41.00			962.23
Jan. 4, 1911...	12.50			974.23
Jan. 26, 1911..	12.50			987.23
Feb. 23, 1911...	12.50			999.23
March 23, 1911	12.50			1012.23
April 21, 1911..	12.50	25.98		998.75

Paid since closing, 9-28-11, \$124.25.

E. E. MINERT.

Checks. Deposits. Balance. O'draft.

May 8, 1911...	.....	\$4.55	.....
May 8, 1911...	\$7.00	.....	\$2.45

K. H. MORSE.

Checks. Deposits. Balance. O'draft.

May 6, 1911...	.....	\$24.35	.....
May 8, 1911...	\$31.75	.....	\$7.40
May 9, 1911...	38.00	40.00	5.40
May 10, 1911..	38.35	42.35	1.40
May 15, 1911..	19.00	.....	20.40
May 22, 1911..	.....	10.00	10.40
May 29, 1911..	8.90	.....	19.30
June 1, 1911...	.....	9.00	10.30

SALMON LAND & MINES CO.

Checks. Deposits. Balance. O'draft.

June 2, 1910...	.....	\$6.12	.....
June 4, 1910...	\$69.75	.....	\$63.60
Aug. 16, 1910..	46.75	.....	110.38
Oct. 18, 1910...	\$37.50	.....	72.88
Oct. 24, 1910...	29.00	.....	101.88
Nov. 17, 1910..	37.50	.....	139.38
Dec. 29, 1910..	6.50	.....	145.88

W. W. SCHULTZ.

Checks. Deposits. Balance. O'draft.

March 15, 1911.	.....	\$6.07	.....
March 31, 1911.	\$451.39	.....	\$445.32
April 15, 1911..	5.00	.....	450.32
April 17, 1911..	2.00	.....	452.32
April 18, 1911..	6.50	.....	458.32
June 7, 1911...	.....	\$451.39	7.43

BERT SIMERS.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 31, 1911...			\$1.03	.....
Feb. 1, 1911...	\$55.00	.....		\$ 53.97
Feb. 3, 1911...	3.75	.....		90.72
Feb. 6, 1911...	32.25	.....		122.97
Feb. 8, 1911...	1.00	.....		123.97
Feb. 28, 1911..	1.90	\$62.50	.....	63.35
March 1, 1911..	43.60	.....		106.95
March 2, 1911..	8.45	.....		115.40
March 6, 1911..	3.00	.....		118.40
March 7, 1911..	1.00	.....		119.40
March 14, 1911.		33.50	.....	85.90
March 15, 1911.	1.00	.....		86.90
March 16, 1911.	10.00	.....		96.90
March 17, 1911.	1.00	.....		97.90
March 22, 1911.	5.00	.....		102.90
March 24, 1911.	1.05	.....		103.95
March 27, 1911.	20.00	.....		123.95
May 1, 1911....	1.85	.....		125.80

Z. T. VINCENT.

	Checks.	Deposits.	Balance.	O'draft.
May 27, 1911..			\$3.49	.....
May 29, 1911..	\$13.88	.....		\$10.39
May 31, 1911..	12.66	.....		23.05
June 1, 1911...	39.33	.....		62.38
June 3, 1911...		\$10.00	.....	52.38

JOHN R. WHEELER.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 26, 1911..			\$758.29	.....
Feb. 6, 1911..	\$1274.16	.....		\$515.87

	Checks.	Deposits.	Balance.	O'draft.
March 4, 1911..	150.00	.....	.....	665.87
March 31, 1911..	51.00	.....	.....	716.87
April 15, 1911..	.....	\$80.00	.....	636.87
April 22, 1911..	2.00	75.00	.....	563.87
April 25, 1911..	45.33	.....	.....	609.20
April 26, 1911..	4.00	.....	.....	613.20
April 27, 1911..	6.00	.....	.....	619.20
April 29, 1911..	5.90	.....	.....	625.10
May 1, 1911...	20.35	.....	.....	645.45
May 2, 1911...	2.50	.....	.....	647.95
May 6, 1911...	3.00	.....	.....	650.95
May 8, 1911...	5.00	.....	.....	655.95
May 16, 1911..	12.00	.....	.....	667.95
May 17, 1911..	179.36	.....	.....	847.31
	4.65	572.70	.....	279.26
June 13, 1911..	572.70	.....	.....	851.96

MYRA L. WHEELER.

	Checks.	Deposits.	Balance.	O'draft.
May 3, 1911...	.....	.....	\$6.15	.....
May 4, 1911...	\$10.00	.....	.....	\$3.85
May 11, 1911..	7.90	.....	.....	11.75
May 18, 1911..	2.00	.....	.....	13.75
May 27, 1911..	4.50	.....	.....	18.25
May 29, 1911..	1.50	.....	.....	19.75

JOS. G. WICKLUND.

	Checks.	Deposits.	Balance.	O'draft.
April 3, 1911...	.....	.....	\$70.61	.....
April 6, 1911...	\$148.49	.....	.....	\$ 77.88
April 11, 1911..	41.45	.....	.....	119.33

	Checks.	Deposits.	Balance.	O'draft.
April 17, 1911..	10.00	.....	.....	129.33
April 29, 1911..	11.85	.....	.....	141.18

FRED CARL.

	Checks.	Deposits.	Balance.	O'draft.
May 1, 1911....		.....	\$44.15	.....
May 6, 1911....	\$50.65	.....	.....	\$ 6.50
May 8, 1911....	199.55	.....	.....	206.05
May 22, 1911..	4.75	.....	.....	210.80
June 3, 1911....	101.75	.....	.....	312.55
June 5, 1911....	52.40	.....	.....	364.95

ELIZABETH McCLUNG.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 30, 1911..		.....	\$5.58	.....
Feb. 15, 1911..	\$5.90	.....	.....	\$ .32
April 15, 1911..	1.50	.....	.....	1.82

W. H. O'BRIEN.

	Checks.	Deposits.	Balance.	O'draft.
March 8, 1911..		.....	\$1.31	.....
April 7, 1911..	\$5.00	.....	.....	\$3.69

F. M. POLLARD.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 18, 1911....		.....	\$285.04	.....
Feb. 8, 1911....	\$397.50	.....	.....	\$112.46
April 13, 1911..		\$5.00	.....	107.46
April 14, 1911..	5.00	.....	.....	112.46

\$90 paid since bank closed.

Endorsed: Filed March 25, 1914. A. L. Richardson, Clerk.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

vs.

HARRY G. KING, et al., *Defendants.*

ANSWER OF DEFENDANT, GUY E. BOWER-
MAN, TO THE FOURTH AMENDED BILL OF
COMPLAINT, FILED HEREIN.

This defendant, now and at all times saving and reserving unto himself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said fourth amended bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

I.

Admits the allegations contained in paragraph I of said fourth amended bill of complaint.

II.

Admits all the allegations contained in paragraph II of said fourth amended bill of complaint, except the allegation that the Directors of the said bank created a surplus fund on the books of said bank of \$5,000.00 on or about the 9th day of July, 1910; and this defendant does not know and has not been informed, save by said fourth amended bill of complaint, whether the said bank created such surplus

funds on the books of said bank, and therefore this defendant leaves the said plaintiff to make such proof thereof as he may be advised is necessary or proper. And this defendant alleges the fact to be that he was not a director of said bank on the said 9th day of July, 1910, and had nothing to do with and knew nothing of creating such alleged surplus of \$5,000.00 on the books of said bank on or about the 9th day of July, 1910.

III.

Admits that for the purpose of enabling the said bank to pay its debts and obligations the Honorable Comptroller of Currency on or about the 11th day of January, 1912, levied an assessment and requisition upon the shareholders of said First National Bank of Salmon to the full face or par value of the shares of stock of said bank, held by each of the said shareholders, respectively, and amounting in all to the sum of \$50,000. But as to how much of the same has been paid into the hands of the Receiver and how much the said Receiver will be unable to collect, this defendant does not know and has not been informed, save by the said fourth amended bill of complaint, whether or not the sum of \$20,000.00 of such amount has been paid into the hands of the said Receiver, or that, owing to the insolvency of a number of said shareholders, the said Receiver will be unable to collect approximately the sum of \$20,000.00 of such assessment, or that after realizing upon all of the assets of said bank now

available, or applying the same to the debts and obligations thereof that a deficiency of approximately the sum of \$20,000.00 of unpaid obligations will remain, this defendant leaves the said plaintiff to make such proof thereof as he may be advised is necessary or proper.

IV.

Admits that this defendant, Guy E. Bowerman, was duly elected and qualified, and thereupon became a duly qualified member of the Board of Directors of said bank at the time of its organization. But this defendant denies that he continued as such Director until the same was placed in the hands of a Receiver, but alleges the fact to be that this defendant was not a member of the said Board of Directors and did not act as a Director of said bank after about the first day of July, 1910.

V.

Denies that this defendant, Guy E. Bowerman, during the term of service as a director of said bank, or at any other time or at all, knowingly permitted or assented to the making of any loan or loans by any officer or officers, agent or agents, or servant or servants of the said First National Bank of Salmon, far or otherwise in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby, or otherwise, large or any sum or sums of money belonging to the stockholders or depositors, or any of them, of said bank became wasted or lost. Denies that on or about the 15th day of

February, 1910, or at any other time or at all, the said defendant Guy E. Bowerman knowingly permitted or assented to the making of any loan or loans to the Salmon Lumber Company of any amount or nature, and especially either or any of the loans set out and contained in subdivision (a) of paragraph V of said fourth amended bill of complaint. Denies that this defendant, Guy E. Bowerman, knowingly permitted or assented to the making of any loan or loans to F. M. Pollard or S. A. Pollard, husband and wife, in any amount of any kind or nature, either as set out and contained in subdivision (b) of paragraph V of said fourth amended bill of complaint, or otherwise. Denies that the defendant, Guy E. Bowerman, knowingly permitted or assented to the making of any loan or loans to Harry Brown in any amount or of any kind or nature or either or any of the loans set out in subdivision (c) of paragraph V of said fourth amended bill of complaint, or otherwise.

VI.

Denies that the defendant, Guy E. Bowerman, from the time of the organization of said bank on the 13th day of January, 1906, until the 8th day of June, 1911, when the said bank suspended business, carelessly or wilfully or negligently failed or neglected to attend any meetings of the Board of Directors of said bank during the entire, or any, period of his incumbency as Director, or wilfully or carelessly or negligently failed during said entire, or any, period to discharge his duty or duties or obligation or obligations as a member of the Board of Directors of said

bank in examining into or keeping well, or otherwise, informed concerning the affairs of such bank, or particularly the loans or any of them which were being made by said bank, or wilfully or carelessly or negligently during the alleged or any period failed to exercise proper or other or any supervisory authority, as such Director, over said bank's affairs, or any of them. Denies that this defendant, Guy E. Bowerman, was a Director of said bank after the first day of July, 1910. Denies that during the, or any, period when the affairs of said bank are alleged to have been grossly or otherwise mismanaged, or particularly during the period when the alleged excessive loans, or any of them, were made, this defendant had any knowledge from the published or other statements of said bank, required to be furnished by the Comptroller of Currency, or otherwise, or from other sources, that the affairs of said bank were being grossly or otherwise mismanaged, or that excessive or illegal loans were being made, or that the said defendant Bowerman carelessly or negligently or wilfully permitted or allowed the said King or Lottridge, or any other person or persons, to make such or any loan or loans, or particularly the alleged loan to the said Salmon Lumber Company, or F. M. Pollard or S. A. Pollard, or Harry Brown, as alleged in said fourth amended bill of complaint, or otherwise, whereby the funds or any of them of said bank became lost, as set forth in said fourth amended bill of complaint, or otherwise.

VII.

As to the allegations contained in paragraph VIII of said fourth amended bill of complaint, that the said Salmon Lumber Company during the time said alleged excessive loans were being made to it became insolvent and was thereafter compelled to suspend business, with assets insufficient to satisfy and discharge its liabilities, that no part of the money so loaned to said Lumber Company by said bank has ever been repaid to said bank, except the sum of \$2,360.00 and the further sum of \$1500.00, or that a loss will result to said First National Bank on account of said loans of approximately \$10,000.00, this defendant does not know and has not been informed, save by the said fourth amended bill of complaint, and therefore leaves the said complainant to make such proof thereof as he may be advised is necessary or proper. As to the further allegation contained in paragraph VIII of said fourth amended bill of complaint, that no part of the alleged \$7,950.00 loaned to said F. M. Pollard and S. A. Pollard was ever repaid by them to said bank, or that although judgment has been recovered on said notes, so executed by said Pollard, the same remains unsatisfied except for a credit of \$150.00, or that the balance of the money so loaned to said Pollards will be lost to the said bank, this defendant does not know and has not been informed, save by said fourth amended bill of complaint, and therefore leaves the said complainant to make such proof thereof as he may be advised is necessary and proper.

And as to the further allegation contained in said paragraph VIII of said fourth amended bill of complaint, that the said Harry Brown is insolvent, or, although he has turned over to said plaintiff all his available assets, no more than approximately \$2,000.00 will be realized therefrom, or that the balance of said alleged excessive loans so made to him, in said fourth amended bill set forth, will be lost to said bank, this defendant does not know and has not been informed, save by said fourth amended bill of complaint and therefore leaves the said complainant to make such proof thereof as he may be advised is necessary and proper.

VIII.

Denies that at the beginning of the year 1909, or at any other time or at all, this defendant, Guy E. Bowerman, as a member of the Board of Directors of said bank, or otherwise, entered upon or participated in a careless or negligent management of the affairs, or any of them, of said bank. Denies that on or about the month of March, 1909, or at any other time or at all, the said Board of Directors without protest from or with the knowledge of this defendant, Guy E. Bowerman, negligently or carelessly or without due or any regard to the rights, or any of them, of the stockholders, or any of them, of said First National Bank of Salmon, purchased all or any of the assets of a rival bank in said town of Salmon, to-wit: The Bank of Langsdorf & Company, paying therefor the sum of \$14,500.00 over or above the par or face value of the assets thereof, or also or

otherwise \$14,500.00 over or above the true value of the assets of said bank, and denies that all, or any, of which was at the time of said purchase well or otherwise known to this defendant, Guy E. Bowerman, or should have been known to the said Guy E. Bowerman, if he had used proper or any care or diligence in determining the value of said assets at or prior to the time of said purchase. Denies that by reason of any negligence or carelessness of this defendant, Guy E. Bowerman, in not ascertaining the true value of said assets, or otherwise, or in paying therefor out of the funds of said First National Bank of Salmon the sum of \$14,500.00, or any other sum in excess of the true value thereof, the money, or any part thereof, of the stockholders of said First National Bank of Salmon became thereby or otherwise lost or negligently or otherwise wasted to approximately the sum of \$14,500.00, or any other sum. And this defendant, Guy E. Bowerman, alleges that he did use all proper care and diligence in his power in regard to the purchase of the alleged bank of Langsdorf & Company, and denies that he was guilty of any negligence or carelessness in respect thereto; denies that he consented to the payment therefor, or that he paid therefor out of the funds, or any of them, of said First National Bank of Salmon, the sum of \$14,500.00, or any other sum, or in any other thing or at all, in excess of the true value thereof.

IX.

Denies that the defendant, Guy E. Bowerman, during his term of office as a Director of said bank, or at

any other time or at all, wilfully or carelessly or negligently failed to properly or otherwise manage or conduct the affairs, or any of them, of said bank, or wilfully or carelessly allowed the same to be grossly or otherwise mismanaged, whereby or otherwise the assets or any of them of said bank were wasted or lost.

X.

This defendant, Guy E. Bowerman, alleges that if between the first day of January, 1910, and the failure of said bank on the 8th day of June, 1911, the said defendant, Harry G. King, as President, and John Lottridge, as Cashier, of such bank, carelessly or negligently loaned the funds, or any of them, of said bank to various persons or companies upon insufficient or no security, or to various other persons or companies not having sufficient assets with which to repay the same, whereby large or any sums of money belonging to the depositors or stockholders of said bank became lost or wasted, or carelessly or negligently or wilfully made large or other loans of the funds of said bank to the officers thereof, or to companies in which some of said officers were interested, or which alleged loans or any of them made as alleged in said bill or otherwise, were far or otherwise in excess of any amount justified by the financial standing of the persons or companies to whom said loans or any of them were made, or carelessly or negligently or wilfully, or in direct or other violation of the by-laws, or any of them, of said bank permitted the money or funds or any part thereof of said

bank to be paid out upon checks or orders, or otherwise, or various persons or companies that did not have sufficient or any funds in such bank with which to pay such checks or orders, whereby large or any sum or sums of money of said stockholders or depositors became wasted or lost, as alleged in paragraph X of said fourth amended bill of complaint, or particularly those loans referred to in subdivisions (a), (b) and (c) of said paragraph X of said fourth amended bill of complaint, the same was done by the said defendants King and Lottridge without the assent, permission or knowledge of the defendant, Guy E. Bowerman, and against his will and over his protest.

XI.

This defendant, Guy E. Bowerman, denies that during the time he was a Director of said bank, or at any other time or at all, he wilfully or carelessly or negligently failed or neglected to attend any of the meetings of the Board of Directors of said bank, or negligently or carelessly or wilfully failed during the time when such alleged wrongful acts, or any of them, were committed, or at any other time, to examine the books or records, or any of them, of said bank to ascertain said bank's condition or to ascertain the amount of overdrafts or loans, or any of them, allowed or made to various or any patron or patrons of said bank; or wilfully or carelessly or negligently failed during the long, or any period, when such alleged mismanagement, or at any other time, was going on to exercise as such Director, or otherwise, proper or any supervisory authority of said

bank's affairs, or any of them, whereby or otherwise said loss, or any loss, might or could have been prevented or avoided. Denies that this defendant, Guy E. Bowerman, had any knowledge of any kind or nature that the affairs or any of them of said bank were being grossly or otherwise mismanaged, or had any knowledge that excessive or illegal loans were being made to various or any person or persons or company or companies, or that the defendant carelessly or negligently or wilfully permitted or allowed the said King or Lottridge, or any other person or persons, to make said excessive or illegal loans, or any of them, as alleged in said bill or otherwise, whereby or otherwise the funds, or any of them, belonging to the stockholders or depositors of said bank became lost or wasted, as alleged, or otherwise.

XII.

Denies that on the 9th day of June, 1910, or at any other time or at all, owing to any careless or negligent conduct or wrongful or illegal act or acts of the defendant, Guy E. Bowerman, as set forth in said fourth amended bill of complaint, or otherwise, during the time this defendant, Guy E. Bowerman, was a Director of the said bank, or at any other time or at all, the capital or surplus of said bank had become much or otherwise impaired, or the value of the assets, or any of them, of said bank greatly or otherwise depreciated. Denies that this said defendant, Guy E. Bowerman, wilfully or knowingly or wrongfully assented to the declaring of a dividend out of the available assets of such bank in the sum of \$2,500.00,

or any other sum, or wilfully or knowingly accepted his proportion of said dividend. Denies that the defendant, Guy E. Bowerman, in violation of law or otherwise, knowingly or carelessly or negligently permitted or assented to the carrying of the sum of \$4500.00, or any other sum, to the surplus account of said bank, thus or otherwise showing on the alleged books, or any of them, the right to make any loan in excess of the amount which could have been legally loaned had the books, or any of them, shown the true condition of the affairs of said bank. Denies that the said Guy E. Bowerman wilfully or knowingly accepted his proportion, or any proportion of said alleged dividend, or with knowledge that the said bank was being mismanaged or that large or excessive or other loans were being made in violation of his oath as such Director, or otherwise, or without exercising proper or any supervisory control over the affairs of any of them of said bank, which as Director of said bank he was in duty bound to do, or otherwise; and denies that the said Guy E. Bowerman wilfully or carelessly or negligently permitted the said dividend or any dividend to be declared, or the alleged sum of \$5,000.00 or any other sum to be carried to the surplus or other account of said bank, as alleged in said fourth amended complaint, or otherwise.

XIII.

Denies that at the time of the closing of said bank, or at any other time, the said defendant, Guy E. Bowerman, during his term as Director of such

bank, or at any other time, in violation of the or any by-laws of said bank, or in violation of his duty as a Director of said bank association, carelessly or negligently failed to supervise the affairs, or any of them, of said bank, or permitted to be paid checks or orders drawn on said bank by persons or companies not having any funds on deposit in such bank with which to pay the same, to the extent of \$9,800.-00, or any other sum, or that many or any of the persons who made such overdrafts were insolvent, or have been or now are unable to repay the money, or any part thereof, so drawn out, or as a result thereof a large or any amount of the money alleged to be so paid will be lost to the said bank. Denies that if the defendant, Guy E. Bowerman, had performed his duty or duties as a Director of such bank, or supervised the affairs or any of them of said bank, he would have known that said overdrafts, or any of them, were being permitted or would have stopped the same or said losses, or any part thereof, would not have occurred. But, on the contrary, this defendant alleges that this defendant, Guy E. Bowerman, did perform his duty as a Director of said bank during the time he was such Director, and did supervise the affairs thereof as best he could under the circumstances.

XIV.

As to the allegation contained in paragraph XIV of said fourth amended bill of complaint, that the loss which will result to the said bank on account of the said excessive loans will reach a probable amount

of \$20,000.00, or that the losses which will result to such bank from the alleged overdrafts will reach the probable amount of \$4,000.00 or more, or that the losses which will result to such bank from the declaration of the alleged illegal dividend will reach the amount of \$2,500.00, or that all such losses are directly caused by the careless or negligent handling of the funds, or the mismanagement of the affairs of said bank, or the wilful neglect of this defendant, Guy E. Bowerman, as a Director of said institution, as alleged in said fourth amended bill of complaint, this defendant does not know and has not been informed, save by said fourth amended bill of complaint, and therefore demands strict proof of the same.

XV.

Denies that the complainant has not a plain, adequate and complete remedy at law.

For a further answer and defense, this defendant, Guy E. Bowerman, alleges as follows:

That at the time of the organization of the First National Bank of Salmon the defendant, Guy E. Bowerman, was elected a Director of said bank by the stockholders of the same, and he immediately qualified and took the oath of office as a Director of said bank; that at the time of his election and qualification as a Director of said bank he was residing at St. Anthony, in Fremont County, State of Idaho, quite a long distance from Salmon City, Lemhi County, State of Idaho, where the said First National

Bank of Salmon was situated, and it was very difficult at said time to reach said Salmon City by reason of the inadequate transportation facilities then existing between St. Anthony and said Salmon City; that no provision was ever made by either the stockholders or directors of said bank for paying this defendant for his time or expenses in going to and from St. Anthony to Salmon City to attend the meetings of the Board of Directors of said bank.

That it was understood at the time this defendant was elected a director of such bank by the stockholders, who elected him such director, that this defendant, by reason of his residing at St. Anthony so far away from Salmon City, and because of the inadequate transportation facilities then existing between St. Anthony and the said Salmon City, and because of the amount of business that this defendant had upon his hands at such time, that this defendant was not to and could not take an active part in the control or management of the affairs of said bank, but was to lend only such assistance as he could under such conditions and circumstances and at such distance as he was located from the place of business of said bank, and that the actual control and management of the business of said bank was to be entrusted to the care and supervision of the officers and agents of said bank residing at Salmon City, State of Idaho; and with this understanding and not otherwise, this defendant consented to become a Director of said bank, and qualified as such and gave the affairs and management of said bank as much supervision, con-

trol and attention as it was possible for him to do, considering his time, health, and the distance that he was located from the place of business of said bank, and the difficulty in going to and from Salmon City to St. Anthony at that time; and that the affairs of said bank and the business of such bank were properly conducted and well managed, so far as this defendant could learn or was able to tell, and that the said bank was doing a good and prosperous business until some time during the early part of the year 1910, at which time the affairs and business of said bank were not being conducted in a right or proper manner and in accordance with the ideas of this defendant as to how a banking business should be managed and conducted as near as this defendant could learn at that time; that this defendant remonstrated with Harry G. King, President of said bank, in regard to the manner in which the affairs and business of said bank were being conducted and refused to approve of certain things that had been done and were then being done; that when his advice, protests, suggestions and demands were unheeded and the said President and other officers of said bank refused to heed or follow the same, this defendant then tendered his resignation as a Director of said bank to the said President, Harry G. King, and refused to continue to serve as a Director of said bank any longer or further; and that on or about the . . . day of January, 1911, after this defendant had so tendered his resignation as a Director of said bank and refused to serve any longer as a Director thereof, the stockhold-

ers of said bank at their annual meeting elected this defendant a Director of the same again, but the same was done during the absence of this defendant and without his knowledge or consent; that when this defendant was notified of his election as such Director and a blank oath was sent him for his qualification as such Director this defendant positively refused to qualify or act as a Director of such bank, and this defendant has not been a Director of said bank since about the first day of July, 1910.

Wherefore, this defendant prays that the plaintiff take nothing by his fourth amended bill of complaint, and that this action be dismissed as against this defendant, Guy E. Bowerman, and that this defendant have judgment against the plaintiff for his costs in this action expended, and for such other and further relief as to this Honorable Court may seem just and meet in the premises and agreeable to equity.

GUY E. BOWERMAN, Defendant.

By Millsaps & Moon,

Residence: St. Anthony, Idaho.

Richards & Haga,

Residence: Boise, Idaho.

Attorneys for Defendant, Guy E. Bowerman.

State of Idaho,

County of Ada,—ss.

J. H. Richards, being first duly sworn, deposes and says: That he is one of the counsel of record on behalf of the defendant, Guy E. Bowerman, and that the said defendant, Guy E. Bowerman, is absent from Ada County, State of Idaho, where this affiant

resides, and by reason of which this affiant makes this verification; that this affiant has read the foregoing answer to plaintiff's fourth amended bill of complaint and knows the contents thereof, and that he believes the same to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 23rd day of September, 1914.

EDNA L. HICE,

(Seal)

Notary Public.

Endorsed: Filed September 24, 1914.

A. L. Richardson, Clerk.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

IN EQUITY—No. 161.

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

VS.

HARRY G. KING, et al., *Defendants.*

AMENDMENT TO ANSWER OF DEFENDANT,
GUY E. BOWERMAN.

Comes now the above-named defendant, Guy E. Bowerman, by leave of Court first had and obtained, and files this amendment to the answer of said defendant Guy E. Bowerman, heretofore filed herein, and for a further and separate defense to the allegations contained in the fourth amended bill of complaint of the plaintiff, filed herein, alleges:

I.

That on or about the 30th day of January, 1911, the First National Bank of Salmon, Idaho, procured a bond in favor of all depositors and other creditors of said bank guaranteeing the payment to the several depositors and other creditors of said bank of any net balance owing to them by such bank upon the suspension of such bank, as will more fully appear from a copy of said bond hereto attached, marked Exhibit "A" and made a part hereof.

II.

That on or about the 7th day of June, 1911, the said First National Bank of Salmon, Idaho, suspended and closed its doors.

III.

That the plaintiff herein was, on or about the 12th day of September, 1911, duly appointed Receiver of such bank, and ever since has been and now is the duly appointed, qualified and acting Receiver of said bank.

IV.

That on or about the 18th day of May, 1912, one A. C. Amonson, in his own behalf and in behalf of all depositors and other creditors of said bank, brought an action in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, against the American Bankers Assurance Company to recover from such company the said net balance owing to each of such depositors and

other creditors by said bank at the time of such suspension, as will more fully appear from a copy of the complaint filed in such action, attached hereto, marked Exhibit "B" and made a part hereof.

V.

That subsequently to the bringing of such action, and on the petition of the said American Bankers Assurance Company, such action was removed to this Court, as will more fully appear from Exhibit "E," attached hereto, and hereinafter referred to.

VI.

That on or about the 30th day of December, 1912, the answer on behalf of the said American Bankers Assurance Company to the said complaint (Exhibit "B") was filed in this Court, a copy of which answer is attached hereto, marked Exhibit "C" and made a part hereof.

VII.

That the said plaintiff herein was a party to said action so commenced by the said A. C. Amonson, as above stated, and as such party joined with the said A. C. Amonson in an application to this Court for an order authorizing a compromise of such action on behalf of the said depositors and other creditors and a release by such depositors and other creditors of such American Bankers Assurance Company from all further liability upon such bond, as will more fully appear from a copy of such application attached hereto, marked Exhibit "D" and made a part hereof.

VIII.

That subsequently such proceedings were had in such action that on the 9th day of May, 1913, this Court rendered a decree therein authorizing such compromise and a release of the said American Bankers Assurance Company from further liability under such bond to the said depositors and other creditors of said First National Bank of Salmon, Idaho, as will more fully appear from a copy of such decree attached hereto, marked Exhibit "E" and made a part hereof.

IX.

That by reason of the foregoing the said plaintiff, as the representative of the said depositors and other creditors of said bank, is estopped from proceeding further against this defendant herein.

Wherefore, this defendant prays, as heretofore prayed in the answer of said defendant, Guy E. Bowerman, to which this is an amendment, that the plaintiff take nothing by his fourth amended bill of complaint, and that this action be dismissed as against this defendant, Guy E. Bowerman, and that this defendant have judgment against the plaintiff for his costs in this action expended, and for such other and further relief as to this honorable Court may seem just and meet in the premises and agreeable to equity.

GUY E. BOWERMAN, Defendant.

By Millsaps & Moon,

Residence: St. Anthony, Idaho.

Richards & Haga,

Residence: Boise, Idaho.

Attorneys for Defendant, Guy E. Bowerman.

United States of America,
District of Idaho,
County of Ada,—ss.

J. H. Richards, being first duly sworn, deposes and says: That he is one of the counsel of record on behalf of the defendant, Guy E. Bowerman, and that the said defendant, Guy E. Bowerman, is absent from Ada County, State of Idaho, where this affiant resides, and by reason of which this affiant makes this verification; that this affiant has read the foregoing amendment to answer of said defendant to plaintiff's fourth amended bill of complaint and knows the contents thereof, and that he believes the same to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 11th day of December, 1914.

EDNA L. HICE,

(Seal)

Notary Public.

EXHIBIT "A."

Number 122

\$320,000.00

AMERICAN BANKERS ASSURANCE
COMPANY

Copyright, 1910, John B. Christensen.

By these presents, in consideration of the sum of \$800, premium paid for the execution of this bond, receipt of which is hereby acknowledged, AGREES TO PAY UPON DEMAND at its office in the City of Dover, Delaware, TO ALL DEPOSITORS AND OTHER CREDITORS OF

FIRST NATIONAL BANK

of Salmon, in the State of Idaho, herein called the

“Bank,” THE NET BALANCE OWING TO SUCH DEPOSITORS AND CREDITORS as the same becomes due.

PAYMENT, TO THE SEVERAL DEPOSITORS AND CREDITORS, WILL BE MADE UPON RECEIPT OF SATISFACTORY PROOF OF THE NET SUMS DUE, accompanied by proof that said Bank has suspended payment or is unable to meet the demands of its creditors in due course of business. Each depositor or creditor shall accompany said proof with an assignment and transfer of any and all claims, which he holds against said bank to the AMERICAN BANKERS ASSURANCE COMPANY, together with any evidence of such indebtedness which he may have or control. After delivery of proof and assignment as above provided for, said company shall have the right (unless fully satisfied as to the justness and validity of all claims presented) to Ninety Days time in which to make investigation as to the amount and validity of all claims, and during such period no depositor or creditor shall have any right of action.

THE SUM DUE from the Assurance Company to each depositor or creditor shall, except as herein provided, be the net balance owing to him by the bank, after deducting from his claim, the total sum of any and all indebtedness of every character, whatsoever, owing by such depositor or creditor to said bank and if such depositor or creditor shall be a stockholder of said bank such deduction shall include the amount of any unpaid stock subscription or stockholders' liability owing by him to such bank.

CLAIMS OF DEPOSITORS or creditors must be presented to the American Bankers Assurance Company, as above provided, within three months after suspension of payment by said bank, and there shall be no liability whatever upon the said Company for any claim not so presented.

There shall be no liability under this bond for any indebtedness due to any officer or *direction* of said bank, nor for any indebtedness fraudulently contracted if the claimant, or any of those under whom he claims has participated in such fraud.

THE TOTAL LIABILITY of the undersigned Company under this bond shall in no event exceed the SUM OF THREE HUNDRED TWENTY THOUSAND AND NO-100 DOLLARS.

If claims are established in excess of total liability above stated, the sum for which the undersigned Company is liable shall be *pro rated* among the several depositors and creditors. There shall be no liability under this bond in favor of any single depositor or creditor in an amount exceeding the sum of thirty thousand dollars, nor in favor of any depositor or creditor who has taken any special bond or security other than the security herein provided, nor shall any right of contribution or subrogation or other recourse exist in favor of any person or corporation against the undersigned Company, by reason of any depository bond or other security given or provided by any such persons or corporations except the AMERICAN BANKERS ASSURANCE COMPANY.

This bond shall be in force from Nine o'clock A. M. Standard time, on the first day of Feb., 1911, until Four o'clock P. M., Standard time, on the 31st day of Jan., 1912.

IN TESTIMONY WHEREOF, THE AMERICAN BANKERS ASSURANCE COMPANY has caused these presents to be executed in duplicate by its authorized officers and its corporate seal to be here set at Dover, Delaware, this 30th day of Jan., 1911.

AMERICAN BANKERS ASSURANCE COMPANY.

By John B. Christensen,
Vice President.

(Seal)

Attest: E. A. Peters, *Secretary.*

EXHIBIT "B."

*In the District Court of the Third Judicial District
of the State of Idaho, in and for Ada County.*

A. C. AMONSON, who sues on behalf of himself and
all depositors and other creditors of First National
Bank of Salmon, Idaho, *Plaintiff,*

vs.

AMERICAN BANKERS ASSURANCE COMPANY, a Corporation, *Defendant.*

COMPLAINT.

The plaintiff complains of the defendant and alleges:

I.

That the First National Bank of Salmon, Idaho, is, and at all the times hereinafter mentioned was a

National Banking Corporation duly organized and existing under the laws of the United States pertaining to National Banks and was up to and on the 7th day of June, 1911, transacting a National Banking business at the City of Salmon, in the State of Idaho.

II.

That on said 7th day of June, 1911, said First National Bank of Salmon, Idaho, closed its doors and suspended payment, and was at that time, and ever since has been insolvent and unable to meet the demands of its creditors in due course of business. That thereupon one Harry Yaeger, a National Bank Examiner of the United States, was placed in charge of said bank by the Comptroller of the Currency of the United States, and was thereafter on the 8th day of August, 1911, appointed Receiver of said bank by said Comptroller, and resigned as said Receiver on September 12, 1911, upon which date Frank R. McCormick was appointed by the said Comptroller, qualified, and ever since has been, and now is, the duly qualified and acting Receiver of said First National Bank of Salmon, Idaho.

III.

That prior to and on the said 7th day of June, 1911, the plaintiff was an unsecured depositor in said First National Bank of Salmon, Idaho, and had on deposit in said bank at the time said bank closed its doors and suspended payment \$5500, in lawful money of the United States. That the amount of said deposit was net over and above any and all

claims of the bank against this plaintiff excepting \$2500 partnership note which has been paid in full. That the amount of said deposit has not been paid, nor has any part thereof been paid, and the whole thereof is now due and owing from said bank to this plaintiff, excepting 20 per cent paid by the Receiver in dividends.

IV.

That the American Bankers Assurance Company is a corporation duly organized and existing under the laws of the State of Delaware and transacting business in the State of Idaho under and by virtue of a compliance with the laws of said State, and was, during the times hereinbefore mentioned, qualified and authorized to transact a general surety and assurance business, and was engaged particularly in the business of insuring depositors and creditors of banks against loss by reason of the suspension, failure or insolvency of said banks.

V.

That on the 30th day of January, 1911, said American Bankers Assurance Company, in consideration of a premium then paid, made, executed and delivered to all depositors and other creditors of said First National Bank of Salmon, Idaho, its certain bond obligatory in the total sum of \$320,000.00, wherein and whereby it agreed to pay to such depositors and creditors the net balance owing to them as the same became due upon receipt of satisfactory proof of the net sum due, accompanied by proof that said bank

had suspended payment or was unable to meet the demands of its creditors in due course of business. By the terms of said bond the same was to remain in force and was in force from 9 o'clock A. M., Standard time, on the 1st day of February, 1911, until 4 o'clock P. M., Standard time, on the 31st day of January, 1912.

VI.

That by the terms of said bond the defendant agreed to pay and became liable to pay to this plaintiff the said amounts so on deposit in said bank to his credit upon compliance with the certain conditions mentioned and recited in said bond. That the plaintiff duly performed all the conditions of said bond on his part to be performed. That the plaintiff has demanded that the defendant pay the said amount of said deposit so due to the plaintiff, as hereinbefore stated, and said amount is due from the defendant to the plaintiff under the terms of said bond.

VII.

That immediately upon the closing of the doors of said First National Bank of Salmon, Idaho, and suspension of payment as aforesaid, the said Harry Yaeger, National Bank Examiner, in charge of said bank, notified the defendant, American Bankers Assurance Company, of the failure and suspension of payment of said bank, and subsequently on or about July 9th, 1911, the said Harry Yaeger furnished to said defendant on behalf of all depositors and creditors of said bank a detailed statement of the amounts due depositors and other creditors of said First Na-

tional Bank of Salmon, Idaho. That further performance of the conditions of said bond was waived by the defendant, American Bankers Assurance Company, in the manner following, that is to say:

(a) The said American Bankers Assurance Company repeatedly between the 7th day of June, 1911, and the 22nd day of September, 1911, recognized, acknowledged and admitted liability to all depositors and creditors upon said bond, and promised to pay the full amount of all claims of said depositors.

(b) That upon the receipt of said statement of July 9th, 1911, or thereabouts, as hereinbefore alleged, the said American Bankers Assurance Company, by its Manager, L. A. Coate, accepted said statement and made no request or demand for any other, further, or additional statement and made no objection to the form or manner of the statement furnished, and furthermore paid no attention to and ignored the requests by the said Harry Yaeger for forms or blanks or information as to any other or further proof which would be required, and thus led said Harry Yaeger, and through him the depositors and other creditors, to believe that no further proof would be required.

(c) That during all of said period from the 7th day of June, 1911, to the 22nd day of September, 1911, and thereafter up to the 6th day of October, 1911, the said defendant entered into and conducted negotiations with said Receiver, and each of them, looking towards and contemplating the re-opening

of said bank as being more desirable than liquidation thereof, and promised to do whatever could be done towards that end and promised to send an examiner on behalf of said defendant company to look fully into the condition of said bank and the claims of said depositors, and promised that said examiner would attend to all matters connected with such liquidation or submit a proposition for re-opening the said bank upon his visit.

That by said negotiations, representations and course of dealings the said Harry Yaeger, as National Bank Examiner and as Receiver, was led to believe during the three months immediately ensuing upon the failure and suspension of said bank that the said bank would be re-opened through the agencies of the said defendant, or that the said defendant would send its examiner during that period to examine into the claims of the depositors and affairs of the bank and would make satisfactory adjustment of said claims, and for all these reasons no steps were taken to make formal statements or proofs of claims of individual depositors, nor were such depositors notified of their right or privilege to make such claims, and said depositors, and particularly this plaintiff, were and remained in ignorance of the conditions and provisions of said bond executed by the defendant, as aforesaid, for their benefit and neglected to make such formal proof.

That defendant did not send its said examiner to look into said claims and affairs of said bank, and its action in promising to do so, as this plaintiff is in-

formed and believes and alleges on information and belief was intended, and did cause said Harry Yaeger, and through him said depositors and other creditors of said bank aforesaid, to refrain from proving said claims in strict accordance with the terms of said bond.

(d) That after the expiration of the period for presentation of formal proofs of claim, to-wit, on or about the 22nd day of September, 1911, Frank R. McCormick, Receiver of said bank, paid to the defendant company, and the defendant company accepted, the balance of the premium upon said bond of assurance, to-wit, the sum of \$400.00, and by so accepting the same the said company recognized said bond of assurance as in force.

(e) That on or about the 10th day of April, 1912, the said plaintiff and all other depositors of said bank, through their attorneys, submitted an itemized list of all claims due the said depositors and other creditors of said bank and offered to make the specific assignments of said claims to the said defendant. That the said defendant retained said proof and offer but made no reply thereto.

VIII.

That the plaintiff brings this suit on behalf of himself and all depositors and other creditors of said First National Bank of Salmon, Idaho. That there are a great number of said depositors and other creditors, to-wit, over 300.

That a list of all said depositors and other creditors with the net amount due each upon the date of

suspension and now due is hereto annexed, marked Exhibit "B" and by reference made a part hereof. That the various allegations of this complaint are hereby repeated and reiterated as to each one of said depositors and other creditors to the same extent as if they were repeated at length substituting in each case the name of the depositor or creditor and the amount due him.

That the question involved in this cause is one of common and general interest of many persons and the parties, to-wit, the said depositors and other creditors, are numerous and it is impracticable to bring them all before the Court, and for each to sue separately in the ordinary course of law would involve multiplicity of suits. That furthermore, this plaintiff and all depositors and creditors have joint proportionate interests in the common fund and neither has any right to preference or superiority to the other and the plaintiff and all other depositors are remediless in the ordinary course of law.

Wherefore, the plaintiff prays judgment as follows:

(1) That he be given judgment for the amount of his claim and costs of suit.

(2) That notice of said suit be given to all depositors and other creditors of said First National Bank of Salmon; that said depositors and other creditors be given an opportunity to appear and to present and prove their said claims and be given judgment for the amount thereof.

(3) That all funds of the defendant within the jurisdiction of the Court and available to the satisfaction of said claims, not in excess of the amount of said bond, be sequestered and placed in the hands of a Receiver, to be appointed by the Court for said purpose, and that said Receiver distribute said funds in pro rata proportion to the approved claims among the plaintiff and the several depositors and other creditors who may prove their claims in this suit.

(4) That the plaintiff and all depositors and other creditors of said bank be given all other, further and proper relief which to the Court may seem just and equitable.

And the plaintiff will ever pray, etc.

CAVANAUGH, BLAKE & MacLANE,
Attorneys for Plaintiff,
Residence: Boise, Idaho.

State of Idaho,
County of.....,—ss.

A. C. Amonson, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof, and that he believes the facts therein stated to be true.

A. C. AMONSON.

Subscribed and sworn to before me this 15th day of May, 1912.

J. P. NIXON, JR.,
Notary Public.

J. P. Nixon, Lemhi County, Idaho. Notarial seal.

ENDORSEMENT.

*In the District Court of the Third Judicial District
of the State of Idaho, in and for Ada County.*

A. C. AMONSON, who sues on behalf of himself and
all depositors and other creditors of First Nation-
al Bank of Salmon, Idaho, *Plaintiff,*

VS.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation, *Defendant.*

COMPLAINT.

Filed 3:28 P. M., May 18, 1912.

Stephen Utter, Clerk.

By B. Clyde Eagleson, Deputy.

EXHIBIT "C."

In EQUITY.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. C. AMONSON, who sues on behalf of himself
and all other depositors and other creditors of
First National Bank of Salmon, Idaho,

Plaintiff,

VS.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation, *Defendant.*

ANSWER.

The answer of American Bankers Assurance Company, a Corporation, to the bill of complaint.

This defendant, reserving all manner of exception that may be had to the uncertainties and imperfec-

tions of the bill, comes and answers thereto, or to so much thereof as he is advised is material to be answered, and says:

I.

Admits all the allegations of paragraph I of plaintiff's bill of complaint.

II.

Admits all the allegations of paragraph II of plaintiff's bill of complaint.

III.

Defendant has no knowledge, and neither denies or admits that prior to and on the said 7th day of June, 1911, the plaintiff was an unsecured depositor in said First National Bank of Salmon, Idaho, and had on deposit in said bank at the time said bank closed its doors and suspended payment \$5500.00, in lawful money of the United States. That the amount of said deposit was net over and above any and all claims of the bank against this plaintiff, excepting \$2500 partnership note which has been paid in full. That the amount of said deposit has not been paid, nor has any part thereof been paid, and the whole thereof is now due and owing from said bank to this plaintiff, excepting 20 per cent paid by the Receiver in dividends, and therefore puts the plaintiff to his proof.

IV.

Defendant admits all of the allegations of paragraph IV of plaintiff's bill of complaint.

V.

Defendant admits that on the 30th day of January, 1911, said American Bankers Assurance Company, in consideration of a premium then paid, made, executed and delivered to all depositors and other creditors of said First National Bank of Salmon, Idaho, its certain bond obligatory in the total sum of \$320,000.00, but denies, except as is in the said bond provided, that therein and thereby it agreed to pay to such depositors and creditors the net balance owing to them as the same became due upon receipt of satisfactory proof of the net sum due, accompanied by proof that said bank had suspended payment or was unable to meet the demands of its creditors in due course of business. Admits that by the terms of said bond the same was to remain in force and was in force from 9 o'clock A. M., Standard time, on the 1st day of February, 1911, until 4 o'clock P. M., Standard time, on the 31st day of January, 1912.

VI.

Admits that by the terms of said bond the defendant agreed to pay and become liable to pay to this plaintiff the said amounts so on deposit in said bank to his credit upon compliance with the certain conditions mentioned and recited in said bond, but denies that the plaintiff duly performed all the conditions of said bond on his part to be performed and denies that the plaintiff has demanded that the defendant pay the said amount of said deposit so due to the plaintiff as hereinbefore stated, and denies that said amount is due from the defendant to the plain-

tiff under the terms of said bond, or in any other sum.

VII.

Defendant denies that immediately upon the closing of the doors of said First National Bank of Salmon, Idaho, and suspension of payment as aforesaid, the said Harry Yaeger, National Bank Examiner, in charge of said bank, notified the defendant, American Bankers Assurance Company, of the failure and suspension of payment of said bank, and subsequently on or about July 9th, 1911, the said Harry Yaeger furnished to said defendant on behalf of all depositors and creditors of said bank a detailed statement of the amounts due depositors and other creditors of said First National Bank of Salmon, Idaho, but alleges the truth to be that the said Harry Yaeger had no knowledge that there was a bond in the possession of the bank securing depositors until after so notified by the present Receiver, Frank R. McCormick, and that he could not and did not serve notice of any kind upon the company or any of its officers and agents until after the expiration of ninety days, the time given to creditors to notify the American Bankers Assurance Company. Defendant denies that further performance of the conditions of said bond was waived by the defendant, American Bankers Assurance Company, in the following manner:

(a) Deny that the said American Bankers Assurance Company repeatedly between the 7th day of June, 1911, and the 22nd day of September, 1911, recognized, acknowledged and admitted liability to all depositors and creditors upon said bond, and

promised to pay the full amount of all claims of said depositors, but alleges the truth to be that the American Bankers Assurance Company in no way, either by officer, agent or otherwise, between the 7th day of June, 1911, and the 22nd of September, 1911, recognized or admitted liability to any depositors or creditors or admitted liability to any depositors or creditors upon said bond, nor did they promise to pay any claim of creditors or depositors.

(b) Denies that upon the receipt of said statement of July 9, 1911, or thereabouts, as hereinbefore alleged, the said American Bankers Assurance Company, by its Manager, L. A. Coate, accepted said statement and made no request or demand for any other further or additional statement, and made no objection to the form or manner of the statement furnished, and furthermore paid no attention to and ignored the requests by the said Harry Yaeger for forms or blanks or information as to any other or further proof which would be required, and thus led said Harry Yaeger, and through him the depositors and other creditors, to believe that no further proof would be required, but alleges the truth to be that L. A. Coate was not in the employ of the American Bankers Assurance Company on July 9, 1911, having severed all connection with the American Bankers Assurance Company about the 15th day of April, 1911.

(c) Defendant denies that during all of said period from the 7th day of June, 1911, to the 22nd day of September, 1911, and thereafter up to the 6th

day of October, 1911, the said defendant entered into and conducted negotiations with said Receivers, and each of them, looking towards and contemplating the re-opening of said bank as being more desirable than liquidation thereof, and promised to do whatever could be done towards that end, and promised to send an examiner on behalf of said defendant company to look fully into the condition of said bank and the claims of said depositors, and promised that said examiner would attend to all matters connected with such liquidation or submit a proposition for re-opening the said bank upon his visit.

That by said negotiations, representations and course of dealings the said Harry Yaeger, as National Bank Examiner and as Receiver, was led to believe during the three months immediately ensuing upon the failure and suspension of said bank that the said bank would be re-opened through the agencies of the said defendant, or that the said defendant would send its examiner during that period to examine into the claims of the depositors and affairs of the bank and would make satisfactory adjustment of said claims, and for all these reasons no steps were taken to make formal statements or proofs of claims of individual depositors, nor were such depositors notified of their right or privilege to make such claims, and said depositors, and particularly this plaintiff, were and remained in ignorance of the conditions and provisions of said bond executed by the defendant, as aforesaid, for their benefit, and neglected to make such formal proof, but defendant alleges that it was not charged with the duty of no-

tifying said plaintiff or said depositors of their rights and privileges under said bond, but on the contrary the bank was the agent of said depositors, and upon the suspension of the bank the Receiver was their agent and it was the duty of the bank and the Receiver to know the existence of said bond, the terms thereof, and to notify the depositors of their rights thereunder and to protect them thereunder. Defendant admits that it did not send its said Examiner to look into said claims and affairs of said bank, but alleges that it never promised to do so and was under no obligation to do so. Defendant denies that it ever promised to send an examiner and therefore that its action in promising to do so could have been intended or did cause the said Harry Yaeger, and through him said depositors and other creditors of said bank aforesaid, to refrain from proving said claims in strict accordance with the terms of said bond, but defendant alleges the truth to be that from August 31, 1911, until about the 12th day of June, 1912, the officers and directors of the American Bankers Assurance Company were under a restraining order from the Court of Chancery of the State of Delaware, in and for Kent County, prohibiting them to transact any business of any kind whatever for the company, and that it would have been an impossibility for the company to have legally acted or committed itself in any way to the Receiver of the First National Bank of Salmon, Idaho, or any of its creditors, or any other person or persons interested in claims against the company; the Receiver, pendente lite, appointed by the aforesaid Court, being the only

person who at any time transacted any business for the company during said period aforesaid.

(d) Defendant denies that after the expiration of the period for presentation of formal proofs of claim, to-wit, on or about the 22nd day of September, 1911, Frank R. McCormick, Receiver of said bank, paid to the defendant company, and the defendant company accepted, the balance of the premium upon said bond of assurance, to-wit, the sum of \$400.00.

(e) Defendant has no information or belief whether or not that on or about the 10th day of April, 1912, the said plaintiff and all other depositors of said bank, through their attorneys, submitted an itemized list of all claims due the said depositors and other creditors of said bank and offered to make specific assignments of said claims to the said defendant. That said defendant retained said proof and offer but made no reply thereto, but alleges the truth to be that on the 10th day of April, 1912, the restraining order issued by the Delaware Court, as aforesaid, was still in force and if there was any notice of existing claims and offers to make specific assignments given by the attorneys of the depositors as alleged, these notices never reached the defendant or its officers and they have no knowledge whatever of any such notices having been given. The affairs of the company, its books, records, etc., were wholly in the hands of the Receiver in Delaware, and that aforesaid notices were not received by such Receiver.

VIII.

Defendant has no knowledge and neither admits

or denies that the plaintiff brings this suit on behalf of himself and all depositors and other creditors of said First National Bank of Salmon, Idaho. That there are a great number of said depositors and other creditors, to-wit, over 300. That a list of all said depositors and other creditors with the net amount due each upon the date of suspension and now due is hereto annexed, marked Exhibit "B," and by reference made a part hereof. That the defendant extends all the denials and affirmations in this its said answer to cover that portion of paragraph VIII of plaintiff's bill, as follows: "That the various allegations of this complaint are hereby repeated and reiterated as to each one of said depositors and other creditors to the same extent as if they were repeated at length substituting in each case the name of the depositor or creditor and the amount due him." Defendant has no knowledge and neither admits or denies that the question involved in this cause is one of common and general interest of many persons and the parties, to-wit, the said depositors and other creditors, are numerous and it is impracticable to bring them all before the Court, and for each one to sue separately in the ordinary course of law would involve multiplicity of suits. That furthermore, this plaintiff and all depositors and creditors have joint and proportionate interests in the common fund and neither has any right to preference or superiority to the other, and the plaintiff and all other depositors are remediless in the ordinary course of law, and therefore puts the plaintiff to its proof.

Having thus made full answer to all the matters and things contained in the bill, this defendant prays to be dismissed hence with its costs in this behalf incurred.

BOGART & HASBROUCK,
Counsel and Solicitors for Defendant.

The above and foregoing answer is made according to the knowledge, information and belief of the officers of the American Bankers Assurance Company.

In testimony whereof, The American Bankers Assurance Company has caused these presents to be executed by its authorized officers and its corporate seal to be here set at St. Louis, Missouri, this 27th day of December, 1912.

AMERICAN BANKERS ASSURANCE COM-

PANY, By I. B. Jones, President.

(Seal)

Attest: Samuel T. Fox, Secretary.

ENDORSEMENT.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. C. AMONSON, who sues on behalf of himself and all other depositors and other creditors of First National Bank of Salmon, Idaho,

Plaintiff,

vs.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation, *Defendant.*

ANSWER.

Filed December 30, 1912.

A. L. Richardson, Clerk.

EXHIBIT "D."

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

A. C. AMONSON, who sues on behalf of himself
and all other depositors and other creditors of
First National Bank of Salmon, Idaho,
Plaintiff,

vs.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation, *Defendant.*
APPLICATION FOR ORDER AUTHORIZING
COMPROMISE OF SUIT.

Come now the above-named plaintiff and Frank R. McCormick, the Receiver of the First National Bank of Salmon, Idaho, and apply to the Court for an order authorizing them to accept the proposition of compromise of this action made by the said defendant, as hereinafter set forth, and respectfully represent to the Court as follows:

I.

That on or about the . . . day of May, 1912, the plaintiff herein filed this action against the defendant upon a certain bond executed and delivered by the defendant to all depositors and other creditors of the First National Bank of Salmon, Idaho, in the total sum of Three Hundred Twenty Thousand Dollars (\$320,000.00), wherein and whereby it agreed to pay to such depositors and other creditors the net balance owing to them as the same became due, upon receipt of satisfactory proof of the net sum due, ac-

companied by proof that said bank had suspended payment or was unable to meet the demands of its creditors in due course of business; that thereafter the defendant filed its answer in said cause, in which it denied that it is in any way now liable to the said depositors and other creditors upon its said bond, and has put in issue the right of said depositors and other creditors to now recover any amount upon said bond; that reference is hereby made to said complaint and answer on file.

II.

That shortly after the said First National Bank of Salmon, Idaho, suspended doing business, the said Frank R. McCormick was appointed the Receiver of said bank, who immediately thereafter qualified and is now acting as such Receiver.

III.

That the State of Idaho is now and was at the time that the said First National Bank of Salmon, Idaho, suspended doing business a depositor in said bank, and had on deposit therein the sum of Twenty-five Thousand Four Hundred Eighty-four and 1-100 Dollars (\$25,484.01), which has not been paid by said bank to the said State of Idaho and is now a valid claim against said bank; excepting the sum of Five Thousand Nine Hundred Thirty-one and 78-100 Dollars (\$5931.78), paid to said State by the United States Fidelity & Guaranty Company of Baltimore, Md., which said amount of said deposit was duly assigned to said company and was by it proved as a claim against said bank.

IV.

That on or about the . . . day of March, 1913, the said defendant made a proposition of compromise and settlement of the above entitled cause to the plaintiff and the said Receiver, in which it agreed to pay upon the claim of the State of Idaho, a depositor of said First National Bank of Salmon, Idaho, the sum of Seventeen Thousand Dollars (\$17,000.00) as payment in full of all claims or demands of any kind that the said depositors and other creditors of said First National Bank of Salmon, Idaho, may have against said defendant upon said bond in consideration of said Receiver's surrendering to it One Thousand Two Hundred Fifty (1250) shares of stock now owned by said First National Bank of Salmon, Idaho, of the said American Bankers Assurance Company and of the said depositors and other creditors releasing said defendant from all further liability upon said bond.

V.

That immediately after receiving said proposition of compromise made by said defendant, the said Frank R. McCormick, as such Receiver, reported the same to the Comptroller of the Currency of the United States for consideration, and recommended that acceptance of the same; that shortly thereafter the Comptroller of the Currency authorized and directed the said Receiver to accept said proposition of compromise made by the defendant; that after a thorough investigation and consideration of the facts now in the possession of the plaintiff, A. C. Amon-

son, and said Receiver concerning said plaintiff's cause of action in said cause, and after consultation with our attorneys representing said plaintiffs, and after further considering the amount that the plaintiffs might recover upon said bond in case they were successful in their said action, we believe it to be to the best interest of said plaintiffs and all parties concerned in said action to accept said proposition of compromise made by said defendant.

Wherefore, the said plaintiff and Receiver for the reasons above stated pray for an order of the Court authorizing them to accept said defendant's proposition of compromise of this action and that an order or decree be made in this cause in accordance with the conditions contained in said proposition of compromise.

A. C. AMONSON, *Plaintiff.*

FRANK R. McCORMICK,

*Receiver of First National Bank of
Salmon, Idaho.*

CAVANAH, BLAKE & MacLANE,

Attorneys for Plaintiff.
Residing at Boise, Idaho.

State of Idaho,
County of Lemhi,—ss.

A. C. Amonson and Frank R. McCormick, being severally duly sworn, depose and say that the said A. C. Amonson is one of the plaintiffs in the above entitled cause, that affiants have each read the foregoing application, know the contents thereof, and

that they each believe the facts therein stated to be true.

A. C. AMONSON.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 8th day of April, 1913.

J. P. NIXON, JR.,

(Seal)

Notary Public.

ENDORSEMENT.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

A. C. AMONSON, who sues on behalf of himself
and all other depositors and other creditors of
First National Bank of Salmon, Idaho,

Plaintiff,

VS.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation,

Defendant.

APPLICATION FOR ORDER OF COMPROMISE.

Filed May 9, 1913. A. L. Richardson, Clerk.

EXHIBIT "E."

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. C. AMONSON, who sues on behalf of himself
and all depositors and other creditors of the First
National Bank of Salmon, Idaho,

Plaintiff,

VS.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation,

Defendant.

DECREE OF COURT.

The above entitled action came regularly on for trial on the 9th day of May, 1913, before the Court, sitting without a jury. Messrs. Cavanah, Blake & MacLane appearing as counsel for the plaintiff, and Messrs. Hawley, Puckett & Hawley and Bogart & Hasbrouck appearing as counsel for the defendant, The cause was submitted to the Court upon the pleadings and evidence and the written application of compromise offered by the respective parties, and the Court, after considering the same, finds that the First National Bank of Salmon, Idaho, is and was at all the times mentioned in plaintiff's complaint a National Banking corporation, duly organized and existing under the laws of the United States pertaining to National Banks, and that on the 7th day of June, 1911, it closed its doors and suspended payment of demands of its creditors; that on the eleventh day of September, 1911, Frank R. McCormick was appointed by the Comptroller of the Currency of the United States Receiver of said bank and is now and ever since has been such Receiver; that prior to and on the 7th day of June, 1911, the plaintiff was an unsecured depositor in said First National Bank of Salmon, Idaho; that the American Bankers Assurance Company, the defendant herein, is a corporation duly organized and existing under the laws of the State of Delaware and transacting business in the State of Idaho, and was engaged particularly in the business of insuring depositors and creditors of banks against loss by reason of the suspension, fail-

ure, or insolvency of said banks; and that on the thirtieth day of January, 1911, the said defendant, in consideration of a premium then paid, made, executed and delivered to all depositors and other creditors of said First National Bank of Salmon, Idaho, its certain bond obligatory in the total sum of \$320,000.00, wherein and whereby it agreed to pay such depositors and creditors the net balance owing to them as the same became due (a copy of said bond is attached to plaintiff's complaint, marked Exhibit "A"); and that on the day of May, 1913, the plaintiff, A. C. Amonson, on behalf of himself and all depositors and other creditors of said First National Bank of Salmon, Idaho, and at the request of said depositors and said Receiver, instituted this action upon said bond in the District Court of the Third Judicial District in and for Ada County against the said defendant, the American Bankers Assurance Company, which was, upon the petition of said defendant, removed to the above entitled Court for trial; that during the trial the said plaintiff and defendant and the said Receiver of the First National Bank of Salmon, Idaho, presented their written and duly verified application for an order authorizing them to compromise the above entitled cause, which was received in evidence by the Court and from which it appears that the State of Idaho is now and was at the time that the said First National Bank of Salmon, Idaho, suspended doing business a depositor in said bank and had on deposit therein the sum of \$25,484.01, which has not been paid by said bank to the said State of Idaho, excepting the sum of

\$5,931.78, paid to the said State by the United States Fidelity & Guaranty Company of Baltimore, Maryland, and which said amount of \$5,931.78 was duly assigned to said company and was by it proved as a claim against said bank, and that the said defendant agrees to pay upon the said claim of the State of Idaho the sum of \$17,000.00, and to take an assignment thereof from the said State, to be acknowledged as a claim against said bank to be paid by said bank only after all depositors, creditors and other demands and claims against said bank have been first paid in full, together with interest thereon, which shall be payment in full of all claims, demands or liabilities of any kind that the said depositors and other creditors of said bank may have against said defendant upon said bond, and that the said Receiver is to surrender and deliver to said defendant 1250 shares of the capital stock of said defendant now owned by said bank.

That immediately after receiving said proposition of compromise made by said defendant the said Receiver reported the same to the Comptroller of the Currency of the United States for consideration, and that shortly thereafter he was authorized and directed by said Comptroller of the Currency to accept said proposition of compromise, and that he and the plaintiff applied to the Court for authority to accept said proposition of compromise and settlement of this cause, as they believed it to be to the best interests of all parties interested in said bond.

Whereupon, by reason of the premises aforesaid, and the evidence submitted, and said written propo-

sition of compromise filed herein, and it appearing that this Court has jurisdiction to settle and adjust the subject matter hereof between all the parties interested therein;

It is ordered, adjudged and decreed, that the said defendant pay to the State of Idaho the sum of \$17,000.00 upon the said claim of said State as a depositor in said First National Bank of Salmon, Idaho, and take from the State of Idaho a receipt therefor to the Receiver of said bank, and an assignment thereof to the said defendant, which said assigned claim shall only be considered an obligation against said bank and the Receiver thereof, after all the depositors and other creditors of said bank are first paid in full with interest, and that said bank surrender to the defendant 1250 shares of the capital stock of said defendant, now held by it.

(F. S. D.) And the defendant, having paid said sum of \$17,000.00 to the State of Idaho, and delivered to the Receiver of said bank the receipt of the Treasurer of the State of Idaho therefor as said payment on said claim of said State as required aforesaid, and the Receiver of said bank having delivered to the defendant said 1250 shares of the capital stock of said defendant as required aforesaid, it is hereby ordered, adjudged and decreed that the said bond above referred to and upon which this suit is brought is cancelled and all further liability of the defendant thereunder is considered satisfied and settled in full.

Done in open Court this 9th day of May, 1913.

(Signed) FRANK S. DIETRICH,
District Judge.

ENDORSEMENT.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

A. C. AMONSON, who sues on behalf of himself
and all depositors and other creditors of the First
National Bank of Salmon, Idaho,

Plaintiff,

vs.

AMERICAN BANKERS ASSURANCE COM-
PANY, a Corporation,

Defendant.

DECREE OF COURT.

Filed May 9, 1913. A. L. Richardson, Clerk.

Endorsed: Filed December 11, 1914.

A. L. Richardson, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

IN EQUITY—No.....

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,

Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE and E. S.
EDWARDS,

Defendants.

ANSWER TO COMPLAINANT'S FOURTH
AMENDED BILL.

*To the Honorable, the Judges of the District of the
United States, in and for the District of Idaho.*

Come now the defendants, Norman I. Andrews, Harry G. King and E. S. Edwards, and for their separate answer to complainant's Fourth Amended Bill admit, deny and allege:

I.

Admit each and every allegation in paragraph I of Complainant's Fourth Amended Bill.

II.

Admit each and every allegation in paragraph II of Complainant's Fourth Amended Bill.

III.

That as to the allegation in paragraph III, stating the purpose of the Comptroller of the Currency in levying an assessment and requisition on the shareholders of said First National Bank to the full face or par value of the shares of stock of said bank held by each of the said shareholders respectively, and amounting in all to the sum of Fifty Thousand Dollars, of which amount there has been paid into the hands of the Receiver the sum of Twenty-five Thousand Dollars, defendants have not sufficient information and belief to enable them to answer said allegation, and therefore deny the same; and that defendants have not sufficient information and belief to enable them to answer as to whether or not a number of the shareholders were insolvent, and therefore deny the same; and said defendants have not sufficient information and belief to enable them to answer the allegation as to whether the Receiver will be unable to collect approximately the sum of

Twenty Thousand Dollars of such assessments or any other part thereof or any sum, and therefore deny said allegation; and that defendants have not sufficient information and belief to enable them to answer the allegation, and the Receiver after realizing upon all of the assets of the said bank now available and applying same to the debts and obligations thereof, the same will be insufficient to pay all of the debts and obligations, and that a deficiency of approximately the sum of Twenty Thousand Dollars of unpaid obligations will remain, or that any unpaid obligations will remain, or that there will be any deficiency in any sum whatsoever, and therefore deny said allegation.

IV.

Admit each and every allegation in paragraph IV of Complainant's Fourth Amended Bill.

V.

Deny that Harry G. King, Norman I. Andrews, Guy E. Bowerman, Fred G. Havemann, George Buck and John Lottridge, and each of them, or either of them, during the term of service of each of said defendants, or at all, as directors aforesaid, knowingly permitted and assented to the making of loans by the officers, agents and servants of said First National Bank of Salmon far in excess of the limit, or in excess of the limit provided by Sec. 5300 of the Revised Statutes of the United States; deny that large sums of money belonging to the stockholders and depositors of said bank became wasted and lost on account of any loans knowingly permitted and assented

to be made by either of the defendants answering herein, in violation of said section or any law, as a result of any wrongful and unlawful conduct of either of the defendants herein knowingly permitted and assented to, or at all. Deny that the members of said H. G. King's family, on the 15th day of February, 1910, or at any other time, were owning any shares of stock in said Salmon Lumber Company.

VI.

Deny that each and all of the loans mentioned in paragraph VI of Complainant's Fourth Amended Bill were in excess of one-tenth part of the stock of said bank actually paid in, and deny that they were each and all in violation of Section 5200 of the Revised Statutes of the United States. Admits that at the times referred to in said paragraph VI, when said alleged loans were claimed to have been made, said Harry G. King was the duly elected and acting President of said bank, the said Norman I. Andrews was the duly elected and acting Vice President, and that the said John Lottridge was the duly elected and acting Cashier thereof, and with the said defendants, Guy E. Bowerman, George Buck and Fred G. Havemann, constituted the Board of Directors of said bank. Admits that said Board of Directors amended Section 34 of the by-laws of said bank by resolution duly passed as alleged in said paragraph VI, but deny that each and all of said defendants, Harry G. King, Norman I. Andrews, George Buck, Fred G. Havemann and John Lottridge, attended all the meetings of said Board of Directors as in said para-

graph alleged and personally passed upon and knowingly approved each monthly statement of loans. Deny that Norman I. Andrews made any of said alleged loans or had anything to do with the making thereof, and deny that Norman I. Andrews, during the time when said alleged loans were made, was charged with the conduct and management of the affairs of said bank, except as a Director thereof. Deny that said Directors, or any of them, knew that at the time alleged loans were made, that said Harry G. King, or any member of his family, held any interest whatsoever in the said Salmon Lumber Company, and deny that the said Norman I. Andrews knew that said Harry G. King and John Lottridge were making any excessive loans to said Salmon Lumber Company, and the said Andrews further denies that he carelessly, negligently, wilfully or knowingly in any way consented that the said King and Lottridge might make any illegal loans to said Salmon Lumber Company, and further denies that the funds of said bank became lost because of any illegal loans made by said bank or any officer thereof to the said Salmon Lumber Company. The defendants, Harry G. King and Norman I. Andrews, further deny that the said Norman I. Andrews, George Buck and Fred G. Havemann knew that excessive loans were made to F. M. Pollard and S. A. Pollard and to said Harry Brown as alleged in Complainant's Fourth Amended Bill, in paragraph VI, and deny that they carelessly, negligently, knowingly and wilfully permitted and allowed the same to be made, and

deny that the funds of said bank became lost because of any of said alleged loans.

VII.

That as to the allegations in paragraph VII, alleging Guy E. Bowerman to have been a duly elected, qualified and acting member of the Board of Directors of said bank, from its organization until the 8th day of June, 1911, and further alleging that he carelessly, wilfully and negligently neglected to attend any meeting of the Board of Directors of said bank during the entire period of his incumbency as a Director, and wilfully, carelessly and negligently failed to, during said entire period, discharge his duties and obligations as a member of the Board of Directors of said bank in examining into and keeping well informed concerning its affairs and particular loans which were being made by said bank, and further alleging that the said Bowerman, during the period when the affairs of said bank were alleged to be grossly mismanaged, wilfully permitted and allowed said King and Lottridge to make such loans, and particularly the loans to said Salmon Lumber Company, F. M. Pollard and S. A. Pollard and Harry Brown, defendants have not sufficient information and belief to enable them to answer said allegations, and therefore deny the same.

VIII.

With reference to paragraph VIII of Complainant's Fourth Amended Bill, defendants deny that the Salmon Lumber Company had insufficient funds to satisfy and discharge liabilities at the time of its

alleged insolvency, and with reference to the money received by said First National Bank of Salmon from the assets of said Salmon Lumber Company, amounting in all to the sum of Thirty-eight Hundred and Sixty Dollars, defendants have not sufficient information and belief to enable them to answer said allegation and therefore deny that any loss will result to said First National Bank on account of any loans made to said Salmon Lumber Company. That as to the allegations in said paragraph, stating that no part of the sum of Seven Thousand Nine Hundred and Fifty Dollars, alleged to have been loaned to said F. M. Pollard and S. A. Pollard, except for a credit of One Hundred and Fifty Dollars, and that the balance of said sum alleged to have been so loaned will be lost to said bank, defendants have not sufficient information and belief to enable them to answer said allegations and therefore deny the same. That as to the allegation that said Harry Brown is insolvent and that not more than approximately Twelve Thousand Dollars will be realized from all his available assets which have been turned over to said Receiver and that the balance of said excessive loans so made to him would be lost to said bank, defendants have not sufficient information and belief to enable them to answer said allegation and therefore deny the same.

IX.

That as to the allegations in paragraph IX defendants admit that the said Board of Directors purchased all the assets of the bank of Langsdorf and Com-

pany, but deny that they paid the sum of Fourteen Thousand Five Hundred Dollars over and above the par or face value of said asseets or said sum over and above the true value of the assets of said bank, but admit they paid the sum of Twelve Thousand Five Hundred Dollars over and above the face and true value of the material assets and did so knowingly and intentionally in order to secure the business of said bank and the good will thereof, believing such a payment was a fair consideration to be allowed for the business and believing that the stockholders of said First National Bank of Salmon would be benefited thereby, and denying any want of care, diligence or negligence in representing the affairs of said bank in said transaction and in paying said sum of Twelve Thousand Five Hundred Dollars, and further denying that by reason of said transaction the money of the stockholders of said First National Bank of Salmon became thereby lost and negligently wasted in the approximate sum of Twelve Thousand Five Hundred Dollars or any sum whatsoever.

X.

That as to the allegations contained in paragraph X, defendants deny that they wilfully, carelessly and negligently failed to properly manage and conduct the affairs of said bank; deny that they wilfully and carelessly allowed the same to be grossly mismanaged whereby the assets thereof were wasted and lost; deny that the said Harry G. King as President and John Lottridge as Cashier, at any time while operating and conducting the affairs of said bank, wil-

fully, carelessly and negligently loaned the funds of said bank to various persons and companies upon insufficient or no security and to various other persons and companies not having sufficient assets with which to pay the same, whereby large sums of money belonging to stockholders and depositors of said bank became lost and wasted; and deny that any sums of money whatsoever belonging to the stockholders and depositors of said bank became lost and wasted because of any carelessness and negligence on the part of said bank officers and directors, in making any loans whatsoever; deny that said King and Lottridge in their capacity as officers of said bank, respectively, during any time whatsoever, carelessly, negligently and wilfully made large loans of the funds of said bank or any loans whatsoever to officers thereof, or to companies in which some of said officers were interested; and deny that any loans alleged to have been made by them in excess of any amount justified by the financial standing of the persons and companies to whom any such loans were made, but admit that in some instances overdrafts of different persons and companies were paid by said bank through the agency of said King and Lottridge, but deny that large sums of money of said stockholders and depositors thereby became wasted and lost. Admits that said King and Lottridge, as officers of said bank, on or about the 11th day of July, 1910, loaned to said F. M. Pollard and S. A. Pollard the sum of Seven Thousand Nine Hundred Fifty Dollars, as evidenced by two notes of that date payable to said bank, that

said note of Six Thousand Two Hundred Fifty Dollars represented a sum which the bank was permitted to loan under the provisions of Section 5200 of the Revised Statutes of the United States and the Acts amendatory and supplemental thereto, and that the sum of One Thousand Seven Hundred Dollars only represented an excess loan under said provisions of the Statutes. Deny that at the time said loans were made the financial standing of said Pollards would not justify the making of said loans, and deny that said loans were wilfully, carelessly and negligently made without sufficient or any security. Deny that at the time the alleged loans were made by said First National Bank of Salmon to said Salmon Lumber Company, the financial standing of said Salmon Lumber Company would not justify the making of said loans or any of them, and deny that said alleged loans or any loans whatsoever were wilfully, carelessly and negligently made, and deny that they were made without sufficient security; admits that the Salmon Lumber Company, after the making of said alleged loans, suspended business, but deny that at that time it had insufficient assets with which to settle its liabilities, and deny that there will be a loss to said bank on account of said alleged loans of approximately Ten Thousand Dollars. Deny that at the time any alleged loans were made to Harry Brown, the financial standing and credit of said Brown would not justify the making of said loans, and deny that any alleged loans made to said Harry Brown were made wilfully, carelessly and negligently and without sufficient or any security; defendants allege

that they have not sufficient or any information and belief to enable them to answer as to the amount received by said First National Bank from the available assets of said Harry Brown alleged to have been turned over to said bank, and therefore deny that said First National Bank of Salmon did not realize more than the sum of Two Thousand Dollars therefrom, and further deny that the balance of said alleged loans made to Harry Brown, over and above the said credit of Two Thousand Dollars, will result in a total loss to said bank.

XI.

That as to the allegations in paragraph XI, defendants deny that said Norman I. Andrews, George Buck and Fred G. Havemann, wilfully, carelessly and negligently permitted and allowed said alleged loans to be made and deny that at the monthly meetings of the Board of Directors of said bank, held during the period within which said loans were made, passed upon, approved and ratified said loans.

XII.

That as to the allegations in paragraph XII, defendants deny that on the 9th day of July, 1910, the capital surplus of said bank had become impaired and the value of the assets thereof greatly depreciated, and deny that the capital surplus of said bank had become impaired and the assets thereof greatly depreciated on account of any wrongful or illegal act done by the officers and directors of said bank, admit that on said date at a meeting of said Board of Directors, it was ascertained that a surplus of

approximately Eight Thousand Dollars was shown to have accrued under the management of said bank, as shown at the prior meeting of the Board of Directors held in the previous June, and that at the said meeting held on the 9th day of July, 1910, Five Thousand Dollars was carried to the surplus account of said bank and Twenty-five Hundred Dollars was paid to the stockholders from this accrued fund of approximately Eight Thousand Dollars. Defendants deny that their acts in declaring and paying said dividend of Twenty-five Hundred Dollars and in carrying said sum of Five Thousand Dollars to the surplus account of said bank, were illegal or intended for the purpose of making loans in excess of the amounts which could have been legally made.

XIII.

That as to the allegations in paragraph XIV, stating that the losses which will result to the said bank on account of the said alleged loans will reach the probable amount of twenty-five or thirty thousand dollars, and that the losses which will result thereto from said alleged overdrafts will reach the probable amount of four thousand dollars or more, defendants have not sufficient information and belief to enable them to answer said allegations and therefore deny the same. Defendants deny that any illegal dividend has been declared and that no loss because of any dividend will occur to said bank for which defendants will be liable; and further deny that the defendants, or either of them, as directors of said First National Bank of Salmon, have caused

any alleged loss to said First National Bank by the careless and negligent handling of its funds or by the mismanagement of its affairs or by their wilfull neglect as directors and officers of said institution.

And for other and further answer, said defendants allege and state:

I.

That on or about the 30th day of January, 1911, the said First National Bank of Salmon, Idaho, procured a bond from the American Bankers Assurance Company in favor of all depositors and other creditors of said bank, guaranteeing to said depositors and creditors of said bank the payment to them as follows:

“The net balance owing to such depositors and creditors as the same becomes due. Payment to the several depositors and creditors will be made upon receipt of satisfactory proof of the net sums due, accompanied by proof that said bank has suspended payment or is unable to meet the demands of its creditors in due course of business.”

Said bond being in the amount of the sum of \$320,000.00, being the total liability on said bond to said depositors and creditors. Said bond being marked Exhibit “A” to the amended answer of defendant, Guy E. Bowerman, to which pleading reference is hereby made and under stipulation on file herein made a part hereof.

II.

That on or about the 7th day of June, 1911, the said First National Bank of Salmon, Idaho, sus-

pended business and closed its doors. That at the time said bank suspended business and closed its doors as aforesaid said bond was in full force and effect.

III.

That the plaintiff herein was on or about the 12th day of September, 1911, the duly appointed, qualified and acting Receiver of said bank, and ever since has been and now is the duly appointed, qualified and acting Receiver of said bank.

IV.

That on or about the 18th day of May, 1912, one A. C. Amonson, in his own behalf and in behalf of all depositors and all creditors of said bank, brought an action in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, against the said American Bankers Assurance Company to recover from such company the said net balance owing to said depositors and other creditors by said bank at the time of such suspension, and by reason of such suspension, as will more fully appear from a copy of the complaint in such action, attached to the amended answer of defendant, Guy E. Bowerman, and marked Exhibit "B"; and under stipulation on file herein is by reference made a part hereof.

V.

That subsequently to the bringing of said action and on the petition of said American Bankers Assurance Company such action was moved to this Court, as will more fully appear from Exhibit "C," attached to the amended answer of defendant, Guy

E. Bowerman, and under stipulation on file herein by reference made a part hereof.

VI.

That on or about the 30th day of December, 1912, the answer on behalf of the said American Bankers Assurance Company to the said complaint, Exhibit "C" to the amended answer of the defendant, Guy E. Bowerman, and under stipulation on file herein by reference made a part hereof, was filed in this Court.

VII.

That the said plaintiff herein was a party to said action so commenced by the said A. C. Amonson as above stated, and as such party joined with the said A. C. Amonson in an application to this Court for an order authorizing a compromise on such action on behalf of the said depositors and other creditors and a release by such depositors and other creditors of the American Bankers Assurance Company from all further liability upon such bond, as will more fully appear from a copy of such application marked Exhibit "D" and attached to the amended answer of defendant, Guy E. Bowerman, and under stipulation on file herein by reference made a part hereof.

VIII.

That subsequently such proceedings were had in such action. That on the 9th day of May, 1913, this Court rendered a decree therein authorizing such compromise and a release of the said American Bankers Assurance Company from further liability under said bond in full satisfaction of all the claims

of the said depositors and all other creditors of said First National Bank of Salmon, Idaho, as will more fully appear from a copy of such decree attached to the amended answer of the defendant, Guy E. Bowerman, under stipulation on file herein, said decree being marked Exhibit "E" to said amended answer, and by reference made a part hereof; that such compromise and settlement in full satisfaction of all claims of all creditors and depositors by reason of said suspension of said bank was made, and said bond released and discharged from further liability thereunder.

IX.

That by reason of said settlement in satisfaction of all claims of said depositors and all other creditors, plaintiff is barred and estopped from again suing on behalf of said depositors and said creditors of said bank, and from taking any further proceedings against these defendants herein.

Wherefore, these answering defendants pray that the plaintiff take nothing by his Fourth Amended Bill of Complaint, and that this action be dismissed as to them and each of them and that these answering defendants and each of them have judgment against the plaintiff for their costs in this behalf expended and for such other and further relief as to the honorable Court may seem just and equitable.

E. W. WHITCOMB,

J. B. ELDRIDGE,

Attorneys for Defendants, Harry G. King, Norman I. Andrews and E. S. Edwards.

United States of America,
District of Idaho,
County of Ada,—ss.

J. B. Eldridge, being first duly sworn, deposes and says that he is one of counsel of record on behalf of the defendants, Harry G. King, Norman I. Andrews and E. S. Edwards, and that the said defendants and each of them are absent from the County of Ada, State of Idaho, where this affiant resides, and by reason of which this affiant makes this verification. That this affiant has read the foregoing answer of said defendants to plaintiff's Fourth Amended Bill of Complaint, and believes the facts stated in the pleading to be true.

J. B. ELDRIDGE.

Subscribed and sworn to before me this the 23rd day of December, 1914.

CHARLES F. REDDOCH,
Notary Public.

Endorsed: Filed December 28, 1914.

A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE and E. S.
EDWARDS,
Defendants.

MOTION TO STRIKE AND NOTICE
THEREOF.

To the above named defendants, Harry G. King, Norman I. Andrews and E. S. Edwards, and to their attorneys, E. W. Whitcomb and J. B. Eldridge, and to the above named defendant, Guy E. Bowerman, and his attorneys, Millsaps & Moon and Richards & Haga:

You and Each of You Will Please Take Notice, That the plaintiff will, on the 8th day of February, 1915, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the court room of said Court, in the City of Boise, Ada County, State of Idaho, move the Court to strike the amendment to answer of the defendant, Guy E. Bowerman, and the affirmative defense of the defendants, Harry G. King, Norman I. Andrews and E. S. Edwards, contained in their answer filed herein, upon the grounds set forth in the motion attached hereto and filed herewith.

Dated January 16, 1915.

FRED J. COWEN,
BUDGE & BARNARD,
Attorneys for Plaintiff.

*In the District Court of the United States, in and for
the District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE and E. S.
EDWARDS, *Defendants.*

MOTION TO STRIKE.

Comes now the plaintiff and moves to strike the "Amendment to Answer" of the defendant, Guy E. Bowerman, and also that portion of the answer of Norman I. Andrews, Harry G. King and E. S. Edwards, designated as paragraphs 1 to 9, inclusive, of the affirmative defense of said defendants, upon the following grounds:

1. That the same does not state facts sufficient to constitute a defense to the plaintiff's Fourth Amended Bill.

2. That the same is immaterial and redundant.

FRED J. COWAN and
BUDGE & BARNARD,

Attorneys for the Plaintiff,
Residence: Pocatello, Idaho.

Endorsed: Filed Jan. 16, 1915.

A. L. Richardson, Clerk.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, February 15th, 1915,

behalf of said defendants, and after argument by the respective counsel and upon consideration the Court ordered that said motion be and the same is hereby sustained.

OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

DECISION.

June 21, 1915.

Jesse R. S. Budge and J. M. Stevens, Attorneys for
Plaintiff.

Millsaps & Moon and Richards & Haga, for Defendant Bowerman.

E. W. Whitcomb, for Defendants Edwards, Andrews
and King.

Dietrich, District Judge:

The First National Bank of Salmon City is in the course of liquidation, and its Receiver, Frank R. McCormick, brings this action against its directors to recover damages, on the ground of their alleged mismanagement of its affairs. There was no service of process upon the defendants, Buck, Havemann and Lottridge, nor is it seriously contended that upon the record judgment for any amount against Edwards would be warranted; as to these four defendants, therefore, the suit will be dismissed without further discussion.

There remains for consideration the liability of the defendant Harry G. King, who was at all times the President or Cashier, and the active managing officer of the bank; Norman I. Andrews, who was the Vice President, and actively engaged as an executive officer; and Guy E. Bowerman, who was a director, but nothing more. With the possible exception in the case of Bowerman, of a part of the year 1911, these three were directors during the entire period

of the bank's existence, which was from January 13, 1906, until June 8, 1911. On the latter date there was a voluntary suspension, and on August 8, 1911, the Comptroller of the Currency, deeming the institution to be insolvent, placed it in the hands of a Receiver.

Originally the bank had a capital stock of \$25,000.00, but on February 5, 1910, this was increased to \$50,000.00. The books showed a surplus of \$1,000.00 on January 7, 1908; an additional \$4,000.00 on January 5, 1909; \$5,000.00 more on February 5, 1909; and still an additional \$5,000.00 on July 9, 1910, making a total of \$15,000.00. Upon taking charge of the bank, the Comptroller levied one hundred per cent assessment upon the stock. A large part of this is uncollectible, and it is apparent that the total assets will be insufficient to pay the depositors in full. The question, therefore, is, can the Receiver recover in this action on behalf of the creditors, and, if so, what amount.

There are five general charges of misfeasance:

- (1) That in March, 1909, the Board of Directors, with the active participation of some, and without the protest of any, of the defendants, carelessly and negligently bought out the rival bank of Langsdorf & Company, by paying \$14,500.00 in excess of the par value of the assets.
- (2) That on July 9, 1910, when there was no warrant for so doing, they declared a dividend of five per cent, and on account thereof distributed \$2,500.00 to the stockholders.
- (3) That from time to time, and in violation of a

by-law expressly prohibiting the practice, overdrafts were allowed, of which items aggregating approximately \$3,900.00 are found to be uncollectible. (4) That the defendants made, or knowingly permitted to be made, loans in excess of the limitation provided by Section 5200 of the Revised Statutes, whereby large sums were lost. (5) That at various times they made, or knowingly permitted to be made, loans of divers amounts to persons who were unworthy of credit.

In qualifying as directors, each of the defendants was required by law to take an oath, that he would, "so far as the duty devolved upon him, diligently and honestly administer the affairs" of the bank, and that he would "not knowingly violate, or willingly permit to be violated, any of the provisions" of the national banking statutes. (Sec. 5147 R. S. U. S.). By Section 5239 (R. S. U. S.) it is expressly declared that: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate, any of the provisions of this title * * * *, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages," etc. Considering the nature of the wrongdoing charged, it is thought that these statutory provisions, rather than the general rules of the common law, furnish the measure of the defendants' duty and responsibility. *Briggs v. Spaulding*, 141 U. S. 132. *Yates v. Jones National Bank*, 206 U. S. 158. *Thomas v. Taylor*, 224 U. S. 71.

Liability of Defendant King.

In view of King's intimate knowledge of and active participation in the transactions of the bank, manifestly his responsibility in the premises represents the maximum of responsibility for any one of the defendants; his liability will therefore be considered first.

The Langsdorf & Company Purchase.

This matter I am inclined to dispose of summarily. The evidence is wholly insufficient to warrant a finding that in making the purchase the directors violated any duty. Even in the light of the wisdom which comes only after the event, it cannot be said that it was ill-advised; and undoubtedly it was in good faith. The purchase price was not unreasonable, and upon the whole I am inclined to think that it was easily within the range of sound business discretion. The mere fact that as a part of the assets so purchased there were loans which in amount exceeded the limit to which national banks are confined is quite immaterial. *Allen v. Xenia First National Bank*, 23 Ohio St. 97. Assuming that such loans were retired when they fell due, there was no semblance of a violation of the national banking act. Nor is it of importance that what is called a bonus was paid. No reason is apparent why a national bank may not pay a premium for what it regards as good paper, bearing a high rate of interest, or should put aside the consideration that such purchase will remove from the field an active competitor.

The Dividend.

The dividend of five per cent, ordered on July 9, 1910, was probably in fact unwarranted, but it does not necessarily follow that the defendant is liable under the law for the return of the \$2,500.00 thus distributed to the stockholders. This is not a suit against the stockholders to recover moneys erroneously paid to them, which in equity they are not entitled to retain. If the defendant is liable at all in this action, he is liable for the whole amount of the dividend, on the theory that, disregarding the obligations of his trust, he knowingly violated the provisions of the law. His duty in this respect is defined by Section 5204 (R. S. U. S.), which prohibits the withdrawal of any part of the capital of a banking association. It is declared that if losses have at any time been sustained equal to or exceeding the undivided profits on hand, no dividend shall be made," and no dividend shall ever be made * * * * to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. "Except for such inference as may be legitimately drawn from the fact that upon liquidation in the latter part of 1911 the bank was found to be then insolvent, there is no evidence of its condition on July 9, 1910. But while, if standing alone, this fact might imply an unhealthy condition of business at an earlier date, when viewed in the light of other features of the record, it is of little probative value. In the first place, it is to be noted that the pleadings do not call into question the propriety of the action of the directors in setting apart as surplus \$1,000.00,

\$4,000.00 and \$5,000.00, on January 7, 1908, and January 5th and February 5th, 1909, respectively. Indeed it is expressly alleged that the bank "did a large and profitable business after its organization until the close of the year 1909." The evidence does not support the view that the Langsdorf purchase in the spring of 1909 was detrimental, but the impression I get from the entire record is that, up to some time in 1910, the business of the institution was prosperous. A railroad was building into Salmon City, and, as is the common experience in such cases, the abnormal amount of money thus put into circulation for labor and supplies, coupled with the natural disposition of the community to over-estimate the financial value of a railway connection, unduly stimulated values and business enterprise. In 1909 the road was completed to Salmon City, and, contrary to expectations, it terminated there, and further construction work was abandoned. The community was again thrown back largely upon its former resources. In the meantime another bank had been opened, and presumably was securing some of the business which would otherwise have gone to this bank. And during the year the defendant was drawn into litigation, which, while it did not directly involve the bank, still, because of its nature and the publicity given to it, had a tendency to undermine public confidence. In view of these conditions, it is entirely possible to reconcile the theory of prosperity and profit up to July, 1910, with the fact of insolvency a year later. It is needless to point out

that a banking business is of a most sensitive character, and radical changes are not infrequently wrought in a very short time. The three large losses upon which the plaintiff relies, and which are next to be considered, are highly illustrative. Two of the debtors were manufacturers of building materials, much in local demand in 1910, and the other was a retailer of such materials. Had building operations continued in 1911 as in 1910, it is wholly improbable that there would have been any loss upon these accounts; the enterprises of these three borrowers would in all likelihood have been profitable, and they would have been able to take care of their obligations. Building ceased and left them bankrupt and the bank with a loss of between twenty and twenty-five thousand dollars. Moreover, notwithstanding the shrinkage of assets resulting from these unfavorable conditions, another bank in the community offered in June, 1911, to take over the business of this bank, and pay the creditors in full, but apparently the proposition failed to secure the approval of the Comptroller of the Currency. In consideration of these conditions, I am unable to conclude that the action of the board in declaring the dividend, and in setting apart a surplus fund on July 9, 1911, signifies either bad faith on the part of the defendant or a careless or unreasonable exercise of judgment. I am satisfied that he did not knowingly or intentionally violate the law.

Overdrafts.

The Receiver finds that overdraft accounts approximating \$3,800.00 are uncollectible. There is

no substantial proof upon the proposition that the numerous individuals to whom these overdrafts were allowed were at the time unworthy of credit; in other words, so far as appears, if, instead of accepting and paying the checks as they came in, the defendant had taken notes from the borrowers for equivalent amounts, there would have been no ground for complaint. The national banking law does not prohibit overdrafts. It does, however, authorize the association to adopt by-laws, and the plaintiff rests upon the terms of a by-law here adopted soon after the organization of the bank, unqualifiedly prohibiting officers and employes from paying any check unless the drawer thereof had on deposit a sufficient amount for that purpose. The defendant explained that in adopting the by-laws, a form had been used, and that this provision was not considered, and that in practice it had never been complied with. In view of banking customs quite universally prevailing in this section of the country, I am inclined to think that the explanation should be given full credence. So general has the practice been of honoring checks by which accounts of customers are sometimes overdrawn in small amounts that I doubt whether it would have been possible for this bank to have succeeded in building up a business at all had the strict terms of this by-law been observed. It is wholly improbable that the stockholders intended such a radical innovation. Notwithstanding the pronounced tendency of the last four or five years toward the adoption of more rigid banking rules, it is to be ques-

tioned whether even today a rigorous enforcement of such a by-law would be found practicable, at least unless all the banks in a given business district joined in such a policy. The independent action of a single bank would result in much irritation and a material loss of patronage. No doubt is entertained that the adoption of the by-law was an inadvertence, and that if any person interested was conscious of its existence he was entirely content that it should become a dead letter. Surely the stockholders must have known that overdrafts were continuously being allowed, and no objection was interposed. It is altogether unlikely that the depositors had any knowledge of the existence of such a by-law, and in the absence of such information they would naturally assume that the bank would carry on its business in the customary way, and would therefore in some instances permit customers to overdraw their accounts. In the reports published from time to time, as required by law, large items of overdrafts were reported. By all concerned there was in effect an acquiescence in the practice, and no one should now be heard to complain. Moreover, if the defendant is to be charged with losses incident to this general and long continued usage, he ought also to be credited with the profits. Undoubtedly patronage was thus secured and held for the bank, and most of the loans thus made were repaid with interest. Upon the whole, I am inclined to think that it would not only be harsh, but unjust, to hold the defendant liable under this head.

Excessive and Improvident Loans.

The other two charges, namely, that excessive loans were allowed, and that loans were carelessly made to individuals not entitled to credit, while involving distinct questions of law and fact, may be considered together, because they relate to the same loans. These were three in number, and represent the bulk of the plaintiff's claim. One was made to the Salmon Lumber Company, a corporation organized and controlled by relatives of the defendant. On July 1, 1910, its liabilities to the bank amounted to \$3,500.00. Additional sums were borrowed by it from time to time during the latter part of the year, with the result that in January, 1911, and at the time the bank closed its doors, the indebtedness aggregated \$15,000.00 besides accrued interest. It is impossible to determine the precise amount of the loss that will be sustained, because of certain contingent interests of the debtor, whose affairs are in the hands of a Receiver or trustee, but I estimate it at \$7,000.00. Another loan was to F. M. and S. A. Pollard, for \$7,950.00, as evidenced by two notes, one for \$6,250.00, dated June 29, 1910, and another for \$1,700.00, dated July 11, 1910. It is found that there will be a loss on account thereof of \$7,800.00. The third loan was to one Harry Brown. It is evidenced by two notes, dated January 2, 1911, one for \$6,500.00, and the other for \$6,250.00, making an aggregate of \$12,750.00. The loss on this item I find will amount to \$11,760.00.

Section 5200, R. S. U. S., as amended by the act of

June 22, 1906 (34 Stat. 45), provides that the total liabilities of a borrower shall not at any time exceed one-tenth of the unimpaired capital stock and surplus of the bank. At the time these loans were made the defendant may have reasonably thought, and I am inclined to credit him with the belief, that the capital, and the surplus of \$15,000.00, were unimpaired, and in that view he could, without wrongdoing, loan to any one person up to \$6,500.00, but no more. These loans, therefore, insofar as they exceeded the amount, were in violation of the statute, and the defendant must be held responsible for the resulting loss; and that is the extent of his liability. True, there is the additional charge that, aside from the question of the statutory limitation, the loans were improvidently made, in that the debtors were not entitled to credit, and that therefore the defendant was wanting in the exercise of reasonable care. It may be that in their maximum amount the loans passed the bounds of prudence; that question it is unnecessary to decide, for we have already reached the conclusion that the defendant must be held liable for the excess over \$6,500.00. Further consideration, therefore, may be confined to the question whether or not credit to the extent of \$6,500.00 involved a want of reasonable care. In the Pollard loan there is no reason to suspect any improper motive; the defendant's sole interest was that of an officer of the bank. In the case of the Salmon Lumber Company, there is the disturbing influence of kinship. The Brown loan had an indirect connection with the business of the Lum-

ber Company, but it is too remote to justify an inference of conscious wrongdoing. The defendant himself explains the circumstances under which the loans were made, and, accepting it as substantially correct—and there is no evidence to the contrary—I am inclined to think that he was warranted in extending credit in each case up to the statutory limit. It must be borne in mind that the full amount of these loans was not made all at once. When credit was first promised it was not anticipated that so much would be required. The needs of the borrowers expanded beyond expectation, and, as is a common experience, it may have been here found necessary to extend further credit in order to protect the existing loan. As already explained, the lines of business in which these three debtors were engaged were naturally the first to suffer from the depression which followed the “boom” attending the building of the railroad, and the fact that their enterprises, for which the original loans were made, turned out to be unsuccessful does not under the circumstances necessarily reflect upon the defendant’s judgment, and certainly does not signify bad faith or want of ordinary care. Upon the whole, I am inclined to the view that in extending credit up to the statutory limit he acted with ordinary prudence.

In conformity with the foregoing conclusions, if, as I think must be done, we apply the amounts which the Receiver has been able to, or will, collect, first to the payment of that part of the loan which was legally made, the liability of the defendant may be

stated as follows: On account of Salmon Lumber Company loan, \$7,000.00; on account of Pollard loan, \$1,450.00; on account of Brown loan, \$6,250.00; making a total of \$14,700.00.

While I have found the conduct of the defendant wrongful, it was not of a flagrant character. I am inclined to think that he continued to extend credit after the limit was reached with the hope of protecting the existing loan, and while this consideration does not excuse, it tends to extenuate the fault. He received no benefit from the use of the money. No interest will therefore be allowed. *Eastfield v. McKeon*, 208 Fed. 580. *Stephens v. Phenix Bridge Co.*, 139 Fed. 248. *Union Steamboat Co. v. Chaffin*, 204 Fed. 412. *White v. United States*, 202 Fed. 501. *La Conner, etc., v. Widmer*, 136 Fed 177. *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174.

Liability of Norman I. Andrews.

While the defendant Andrews participated less actively than King in the management of the bank, it is thought that his legal responsibility is substantially the same. The penalty for knowingly permitting a violation of the law is not less than for knowingly violating it. Andrews lived at Salmon City, and was frequently in the bank. He was the Vice President, and for the period during which the transactions covering these three loans took place, he was receiving a salary of \$100.00 per month; he was also a member of the committee on loans and discounts. That he knew of the making of the loans, and acquiesced, without protest or objection, can hardly be

doubted. It is a reasonable inference to be drawn from the evidence, and if the fact were otherwise it is to be presumed that, being present during the trial, he would not have remained silent.

Guy E. Bowerman.

The status of Bowerman is somewhat different. He had no executive duties, and received no compensation. He resided and was engaged in business at St. Anthony, a distance of approximately two hundred miles from Salmon City, a considerable part of which had to be traveled by stage until the railroad above mentioned came into operation. It further appears that he never attended a meeting of the Board of Directors, nor were notices of meetings sent to him. That he did not participate in, or expressly assent to, or have anything personally to do with the making of the loans in question must be conceded, and by his counsel it is most confidently urged that he is therefore without culpability. While there are expressions in some of the decided cases which seem to support the view that liability cannot be predicated upon mere ignorance and inaction, but that there must be active participation or positive assent, it is in effect conceded that liability may arise from negligence so gross as to amount to knowledge and assent. *Briggs v. Spaulding*, 141 U. S. 132. *Thomas v. Taylor*, 224 U. S. 71. Generally speaking, it must be held, I think, that "directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of

its business, and to exercise reasonable control and supervision of its officers." *Martin v. Webb*, 110 U. S. 7, 15. Making application of this principle, it becomes quite immaterial that customarily no notice of board and stockholders' meetings was sent to Bowerman. He must have known that meetings were being held. He made no request to be notified, and offered no protest or complaint against the practice of holding the meetings without giving him notice. He cannot, under such circumstances, be relieved from responsibility upon the ground that the meetings were so held; his acquiescence was equivalent to consent, and in law he must be deemed to have had notice. It is not a case where, contrary to custom, there was a failure to send notice to a director, of a meeting where action was taken for which it is sought to hold him responsible.

A closely related question, but one not so free from doubt, is suggested by the defendant's non-residence. For the plaintiff it is urged that the fact is without significance, while upon the other side it is put forward as of controlling importance. The sounder view is thought to lie between the two extremes. Upon the one hand, a director must be something more than a mere figure-head; there is no such thing as a nominal directorship. It is a matter of common knowledge that directors are usually chosen because of their standing in the community, and for the purpose, among others, of inspiring public confidence, and drawing business to the bank. Their names are carried upon the stationery, and in advertising liter-

ature, as a sort of a guarantee that the management of the bank will be in good hands. *Gibbons v. Anderson*, 80 Fed. 345. *Campbell v. Watson* (N. J.), 50 Atl. 120. *Warren v. Robinson* (Utah), 57 Pac. 287. *Williams v. McKay* (N. J.), 18 Atl. 824. *Marshall v. Bank*, 85 Va. 676, 17 Am. St. Rep. 84. Be the circumstances what they may, a director rests under the obligation to give a reasonable measure of attention to, and to exercise reasonable diligence in protecting, the interests of the bank. But, upon the other hand, what his duty may be in any specific case must be determined in the light of the circumstances of the case, for here, as elsewhere, questions of negligence are to be decided not by the application of some schedule of specific duties, but by reference to the circumstances of each particular case. No one, for instance, would seriously affirm that the failure of a director to attend a board meeting always and under all circumstances amounts to a breach of duty. It may or may not constitute negligence, depending upon the conditions of the particular case. No one expects or assumes that any director will always be present, and to require constant attendance would be to exact a measure of diligence in excess of what is reasonable. As was said in *Rankin v. Cooper*, 149 Fed. 1010: "Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. They are not insurers or guarantors of the fidelity and proper conduct of the executive officers

of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinary prudent and diligent men would exercise under similar circumstances. The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible." See also: *Briggs v. Spaulding, supra*; *Yates v. Jones National Bank, supra*; *Thomas v. Taylor, supra*; *Mason v. Moore*, 73 Ohio St. Rep. 290, 4 L. R. A. (N. S.), 597; *Movius v. Lee*, 30 Fed. 298; *Chesbrough v. Woodworth*, 195 Fed. 875; *Warner v. Penoyer*, 91 Fed. 587. In this last case it was said: "As to all these losses, the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is

not a correct theory. * * * The Court cannot decree upon conjecture. As against two of the directors, the case for the complainant is predicated upon their failure to attend the semi-annual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow because a director has failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank."

Now in the light of these principles it becomes manifest that the defendant's non-residence is one of the material circumstances that must be considered in determining whether or not he was negligent. The share-holders doubtless all knew where he lived, and if any depositor had any information touching his standing or qualifications as a member of the board he doubtless also knew that he resided at St. Anthony, and was there engaged in the banking business. Having this knowledge, he would not, as a reasonable man, assume that the defendant would frequently spend a week's time in taking the long stage and railroad trip to attend a board meeting, or that he would give attention to the details of the administration. For him to have been in regular attendance would have entailed hardships and a loss of time and money wholly disproportionate to the apparent need for his presence. No one would have expected it, and to do more than anyone expects is generally to exercise not ordinary, but extraordinary, care. In speaking thus, I am not to be under-

stood as holding that the defendant could with propriety absent himself from all the board meetings during a course of several years, or remain in ignorance of the general policies and general course of business in the bank. Even though he never went to Salmon City, he might, through the medium of reports from time to time keep himself measureably well informed. By reason of his business experience, and especially his long experience in banking, he would know what to require in such reports, and it is to be assumed that, generally speaking, the desired information would be given, and given correctly. Insofar as the action of the board of directors is concerned, he could, without great expense or trouble, have had a transcript of the minutes of their meetings from time to time. While he could not, without being present at the board meetings, formally give effect to his views, he could, if he found the executive officers inclined to indulge in improper practices, or to pursue unwise policies, exercise a measure of restraining influence through correspondence. In the absence of evidence to the contrary, I think it must be assumed that he thus kept himself advised; for neglect to employ means of information so obvious and inexpensive would clearly be chargeable as negligence.

True, in a letter from the defendant to King, dated August 29, 1911, there are statements to the effect that he had difficulty in procuring information, but the letter can hardly be regarded as competent proof of this fact. The letter was written after disaster

had befallen the bank, and the statements referred to are plainly self-serving in character. The communication was introduced in evidence by the plaintiff only for the purpose of establishing an admission on the part of the defendant that he had knowledge in July, 1910, that the executive officers were pursuing certain policies which he regarded as unwise. In this connection it should be added that the defendant was not called to the witness stand to explain to what policies the letter refers, nor did he choose to testify in his own behalf, although he was present at the trial. The letter itself furnishes no proof of a knowledge of excess loans.

Now, assuming that the defendant had the information which he would naturally acquire by infrequently attending board meetings, and from a reasonable system of reports, can it be held that he is in any wise responsible for these loans? Did he, with knowledge, remain silent and inactive, when he should have spoken and made active opposition, and did he thus knowingly assent to, or knowingly permit the loans to be made? The evidence is perhaps somewhat wanting in clearness upon the point, but, as I understand, these loans, insofar as the excess is concerned, were all made between July 1, 1910, and February 1, 1911. In each case there was an agreement between King, as the chief executive officer of the bank, and the debtor, for credit, to be extended in the first place by checks drawn on account, the amount of which was subsequently to be covered by notes. At the end of the month, or at such time as

King required, the debtor came in and gave a note for the aggregate amount of the overdrafts theretofore allowed. In the monthly report of "loans and discounts" the executive officials did not exhibit the loans so made, and they were discoverable only upon an examination of the individual depositors' ledger or upon a complete analysis of the aggregated item of overdrafts, for which no detail was reported. Neither were such loans entered in the special loan and discount register. Plainly such a system of bookkeeping and reports, if not designed to conceal, would in effect enable the executive officers to make excess loans, and to withhold knowledge thereof from the directors, unless the latter were sufficiently alert to insist upon an examination of the individual depositors' ledger. And unless a director suspected a disposition to violate the law in this respect, he might very well overlook the necessity for making such an investigation. Doubtless appreciating the strain at this point, counsel for the plaintiff sought to show such a course of business in allowing excess loans as to give rise to the inference that all of the directors must have had knowledge thereof and assented thereto. No loan claimed to have been excessive was made prior to October, 1909. Of dates subsequent thereto several loans or discounts are disclosed by the books in excess of \$5,000.00. It must be borne in mind that of this number those which were not over \$6,000.00 did not exceed the statutory limit. As to each of the others an explanation is furnished by King which makes it clear that he did not deem

them to be obnoxious to the limitation. We need not consider whether his construction of the law can in all cases be upheld; to say the least, his explanations are plausible, and leave little ground to question his good faith. The real point is that the record leaves no room for doubt that he was aware of the limitation, and claimed that he was keeping within it. Surely the Treasury Department could not have been unadvised of the loans relied upon to establish a wrongful custom, but so far as appears no complaint was ever made that they were excessive. In the light of these considerations, when we consider the manner in which the three loans in controversy were made and the failure of the books and reports directly to show their excessive character, together with King's testimony, the impression is left that the executive officers of the bank were conscious that the making of excess loans was likely to elicit disapproval and criticism from some quarter; or at least that it did not have the sanction of custom. In passing upon the question of the reasonableness of Bowerman's conduct, it is to be borne in mind that he had no interest, direct or indirect, in these loans, and that he stood to sustain a substantial loss (\$10,000.00 on account of his investment, and an additional \$10,000.00 on account of a possible assessment of his stock) before any injury could come to depositors. A special committee on loans and discounts, as well as an examining committee, was maintained, and an additional safeguard, it was reasonable to assume, lay in the fact that the Vice President, for whom he

seems to have had a high respect, was being paid a compensation sufficient to obligate him to give a substantial part of his time to the supervision of the affairs of the bank. That he should repose considerable confidence in these agencies was neither unnatural nor unreasonable. It may be conceded that in his failure to attend any of the board meetings, and perhaps in failing to exact detailed reports, he was measurably wanting in the exercise of due care, but upon the whole I am unable to conclude that he was grossly negligent, or that he had such information that it can be said of him that he knowingly permitted the loans to be made. As to him, therefore, the suit will be dismissed. Judgment will go against King and Andrews for \$14,700.00.

Endorsed: Filed June 22, 1915.

A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,

Plaintiff,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LÖTTRIDGE and E. S.
EDWARDS,

Defendants.

DECREE.

This cause came on to be heard at the March, 1915,
term of said Court, held at the City of Pocatello, and

the same having been duly submitted and the Court being fully advised in the premises, upon consideration thereof:

It Is Ordered, Adjudged and Decreed, That the said defendants, Harry G. King and Norman I. Andrews, are each liable for, and that the plaintiff have and recover of and from said Harry G. King and Norman I. Andrews, and each of them, the sum of Fourteen Thousand, Seven Hundred Dollars (\$14,700.00), together with his costs herein in the sum of \$374.31.

It Is Further Ordered, Adjudged and Decreed, That the plaintiff take nothing by reason of his complaint against the said defendants, Guy E. Bowerman and E. S. Edwards, and that as to said defendants, Guy E. Bowerman and E. S. Edwards, plaintiff's bill of complaint herein be dismissed.

There having been no service upon or appearance by defendants, George Buck, Fred G. Havemann and John Lottridge,

It Is Ordered, Adjudged and Decreed, That plaintiff's bill of complaint as to said defendants be dismissed.

Dated this 29th day of June, 1915.

FRANK S. DIETRICH,
U. S. District Judge.

Endorsed: Filed June 29, 1915.

A. L. Richardson, Clerk.

134 *Frank R. McCormick, Receiver, etc., vs.*

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

PRAECIPE.

*To W. D. McReynolds, Clerk of the United States
District Court:*

You Are Hereby Respectfully Requested to incorporate into the transcript on appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit the attached portion of the evidence taken at the trial of said cause.

Dated this 26th day of October, 1915.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,

Attorneys for the Plaintiff.

Frank R. McCormick, being first duly sworn, as a witness for Plaintiff, testified as follows:

My name is Frank R. McCormick. I am Receiver of The First National Bank of Salmon, Idaho, and of the First National Bank of Sutton, Nebraska. I am acting as Receiver of the First National Bank of Salmon by appointment of the Comptroller of the Currency, and was appointed September 12, 1911.

As such Receiver I have in my custody and under my control the books and records of the bank. The book you show me is a record which purports to be the minutes of the meetings of the stockholders and directors of the First National Bank of Salmon.

It is admitted by counsel that the First National Bank of Salmon was organized in January, 1906, with a capital stock of \$25,000.00, and with the defendants named in the bill of complaint, with others, as stockholders, which is admitted in the pleading; also that prior to the failure of the bank, prior to June, 1911, the capital stock of the bank was increased to \$50,000.00, and these defendants were stockholders of the bank, and were also directors of the concern.

Certain portions of the minutes shown at page 9 of the book referred to by the witness, offered in evidence and read into the record without objection, as follows:

“DIRECTORS’ MEETING.”

“At the adjourned meeting of the Board of Directors of the First National Bank of Salmon, held at the bank October 9, 1906, the following named directors were present: H. G. King, N. I. Andrews, M. M. McPherson, E. S. Edwards, A. J. McNab, J. C. Sinclair.

“The minutes of the meeting held September 11, 1906, were read and approved.

“The committee on by-laws presented their report, which was approved, and the by-laws embodied in the

report, having been read and adopted, are hereto annexed and made part of the minutes of the meeting."

Section 6 of the by-laws:

"The President shall hold his office for the current year for which the Board of which he shall be a member was elected, unless he shall resign, become disqualified, or be removed; and any vacancy occurring in the office of President or in the Board of Directors shall be filled by the remaining members."

Section 7:

"The Cashier and the subordinate officers and clerks shall be appointed to hold their offices respectively during the pleasure of the Board of Directors."

Section 8:

"The Cashier of this bank shall be responsible for all the money, funds and valuables of the bank, and shall give bond with security to be approved by the board, in the penal sum of \$10,000.00, conditioned for the faithful and honest discharge of his duties as such Cashier, and that he will faithfully apply and account for all such moneys, funds and valuables, and deliver them to the order of the Board of Directors of this bank, or to the persons authorized to receive them."

Section 9:

"The President of the bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the Board of Directors or by the Cashier, or otherwise come into his hands as President, and shall

give bond, with security to be approved by the board, in the penal sum of \$10,000.00, conditioned for the faithful discharge of his duties as such President, that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such President, and pay over and deliver them to the order of the Board of Directors, or to any person or persons authorized by the board to receive them."

Section 11:

"The bonds of the officers shall be placed in the custody of a stockholder of this bank, to be designated by the Board of Directors, who shall not be one of the bonded officers, to be held by him only upon the order of the board."

Section 16:

"The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order."

"The board may also hold special meetings upon the call of the President, Cashier, or any three or more members, and whenever there shall be no quorum at a regular or special meeting the members present shall adjourn the meeting from day to day until a quorum shall be obtained, and any meeting may be adjourned from time to time by vote of a majority of the quorum present, but no business ex-

cept adjournment shall be transacted in the absence of a quorum.”

Section 17:

“There shall be a committee, to be known as the loans committee, consisting of the President, one Director, and Cashier, who shall have power to make loans, discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the Board of Directors make a report of all bills, notes, and other evidences of debt discounted and purchased by them for the bank since their last previous report.”

Section 19:

“No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order, unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order.”

Section 22.

“The Board of Directors shall have power to prescribe, and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank, and to prescribe the general or particular manner in which its affairs shall be conducted.”

Section 29.

“There shall be appointed by the Board of Directors a committee of three members, whose duty it

shall be to examine every month the affairs of this bank, to count its cash, and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith, and whether the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter."

The Court: Is that the loan committee, Mr. Budge?

Mr. Budge: Yes, your Honor, the examining committee I would call it.

Plaintiff offers in evidence the minutes of the regular annual meeting of the stockholders of the First National Bank of Salmon, found at page 105, entitled: "Regular Annual Meeting of Stockholders."

"The third regular annual meeting of the stockholders of the First National Bank of Salmon was held at the bank on Tuesday, January 12th, 1909, at 4 o'clock P. M., thirty days notice of the time and object of such meeting having been given by publication in the Lemhi Herald of Salmon, Idaho, a copy of which notice is hereto attached. Mr. N. I. Andrews was elected chairman, and Mr. J. C. Sinclair secretary of the meeting. The roll call showed 125 shares of stock present in person, as follows: H. G. King, 75 shares; E. S. Edwards, 30 shares; N. I.

Andrews, 10 shares; J. C. Sinclair, 10 shares. Total, 125.

"The minutes of the second regular meeting of the stockholders, held January 14, 1908, and of the special meeting of stockholders, Jan. 5th, 1909, were read and adopted.

"Mr. H. G. King and J. C. Sinclair having been appointed judges of election for directors, and the ballot having been cast, the judges of election notified the acting Cashier of the bank, and reported the following result of said election:

"N. I. Andrews received 125 votes. E. S. Edwards received 125 votes. M. M. McPherson received 125 votes. G. E. Bowerman received 125 votes. A. J. McNab received 125 votes. H. G. King received 125 votes. J. C. Sinclair received 125 votes.

"N. I. Andrews, M. M. McPherson, A. J. McNab, E. S. Edwards, G. E. Bowerman, H. G. King and J. C. Sinclair, having received the greatest number of votes, were declared elected as directors for the next ensuing year.

"There being no further business for consideration, the meeting then adjourned.

"N. I. Andrews, Chairman. J. C. Sinclair, Secretary."

The attached notice referred to reads as follows:

"Stockholders meeting. The regular annual meeting of the First National Bank of Salmon, Idaho, will be held on the 12th day of January, 1909, at 4 o'clock P. M., at the banking house of this associa-

tion in Salmon, Idaho, for the purpose of electing directors and transacting any other legitimate business. Ray Edwards, Cashier. Dated Dec. 4th, 1908."

The plaintiff now offers in evidence the minutes of the special meeting of the Board of Directors, found at page 117, headed:

"Special Meeting of the Board of Directors."

"A special meeting of the Board of Directors of the First National Bank of Salmon was held at the bank, Wednesday, March 24th, 1909, at 2 o'clock P. M., and the following named directors were present:

"E. S. Edwards, H. G. King, N. I. Andrews, J. C. Sinclair.

"The meeting having been called to order, H. G. King, the President of the bank, presented a report of his negotiation for the purchase of the Langsdorf & Co. state bank, and the report having been accepted, the following resolution was offered:

"Resolved, That the First National Bank of Salmon purchase the bank and good will of the banking business of J. M. Langsdorf & Co., for the bonus or premium of \$14,500.00, in accordance with the terms and conditions set out in full in the written agreement to be signed by the respective parties.

"Upon motion duly made and carried, the resolution as read was passed, and a copy of the agreement of sale ordered spread upon the minutes.

"There being no further business for consideration, the meeting then adjourned.

“H. G. King, Chairman. J. C. Sinclair, Secretary.”

Mr. McCormick: Plaintiff's Exhibit No. 1 came into my possession among the papers and effects of the First National Bank of Salmon. We offer Exhibit No. 1 in evidence.

Mr. Richards: We object to the introduction of Plaintiff's Exhibit 1, if the Court please, on behalf of Bowerman, for the reason that there is no evidence to show that he was present or had any notice of any such special meeting, or any proceeding as required by law.

Mr. Budge: We will supply proof later on to connect Mr. Bowerman with this transaction.

The Court: Very well, on that promise the objection will be overruled.

McCormick: Plaintiff's Exhibit 2 came into my possession as Receiver of the effects of the First National Bank of Salmon. (Exhibit 2 admitted in evidence.)

Frederick V. Biscoe, called and sworn on behalf of plaintiff, testified as follows:

Plaintiff's Exhibit No. 3 offered and received in evidence, being certified copies of the oaths of the members of the Board of Directors, for 1909, 1910 and 1911.

PLAINTIFF'S EXHIBIT NO. 3.

District of Columbia,
City and County of Washington,—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Thomas P. Kane,

Acting Comptroller of the Currency, do hereby certify that the papers hereto attached are true and complete copies of the original oaths of directors of the First National Bank of Salmon, Idaho, for the years 1909, 1910 and 1911. And of the whole of such original on file and of record in my office.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the Treasury Department in the City of Washington and District of Columbia, this 16th day of March, A. D. 1914.

T. P. KANE,

Acting Comptroller of the Currency.

Filed March 9, 1915. A. L. Richardson, Clerk.

OATH OF DIRECTORS.

State of Idaho,
County of Lemhi,—ss.

We, the undersigned, Directors of the First National Bank of Salmon, located at Salmon, Idaho, being citizens of the United States, and all residents of the State of Idaho, do, each for himself, and not one for the other, solemnly swear (affirm) that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said Association has been organized; and, each for himself, does solemnly swear (affirm) that he is the owner in good faith, and in his own right, of the number of shares of stock required by said Stat-

utes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

- | | |
|--------------------|--------------------|
| 1. H. G. KING. | 1. H. G. KING. |
| 2. N. I. ANDREWS. | 2. N. I. ANDREWS. |
| 3. GEORGE BUCK. | 3. GEORGE BUCK. |
| 4. F. G. HAVEMANN. | 4. F. G. HAVEMANN. |
| 5. JOHN LOTTRIDGE. | 5. JOHN LOTTRIDGE. |

Subscribed and sworn (affirmed) to before the undersigned this 10th day of January, 1911.

FRANK L. PLUMMER. (Seal)
Notary Public.

My commission expires February 24, 1912.

NOTE: Each director when elected must take the oath of office and, under section 5147 U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTOR.

State of Idaho,
County of Ada,—ss.

I, the undersigned, Director of the First National Bank located at Salmon, Idaho, being a citizen of the United States, and resident of the State of Idaho, do solemnly swear (affirm) that I will, so far as the duty devolves on me, diligently and honestly admin-

ister the affairs of said Association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which this Association has been organized; and that I am the owner in good faith and in my own right, of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

B. F. OLDEN.

Subscribed and sworn (affirmed) to before the undersigned this 9th day of February, 1911.

CHAS. A. CAIRMS, (Seal)

Notary Public.

N. B. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

IMPORTANT.

Please state below whether elected by the shareholders at the annual meeting or a regularly called meeting, or appointed by the directors to fill a vacancy. Also give the name of the predecessor and if the vacancy was caused by death, resignation, disqualification, or expiration of term of service.

Elected by shareholders at annual meeting in place of

JOHN LOTTRIDGE,

(Signature of Cashier.)

June 21, 1909, 10,000.

OATH OF DIRECTORS.

State of Idaho,

County of Lemhi,—ss.

We, the undersigned, directors of the First National Bank of Salmon, located at Salmon, Lemhi County, Idaho, being citizens of the United States, and all residents of the State of Idaho, do, each for himself, and not one for the other, solemnly swear (affirm) that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said Association has been organized; and, each for himself, does solemnly swear (affirm) that he is the owner in good faith, and in his own right, of the number of shares of stock required by said Statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

Signature.

- | | |
|--------------------|----------------------|
| 1. H. G. KING. | 4. JOHN C. SINCLAIR. |
| 2. N. I. ANDREWS. | 5. J. G. HAVEMANN. |
| 3. JOHN LOTTRIDGE. | 6. GEORGE BUCK. |

Subscribed and sworn (affirmed) to before the undersigned this 18th day of January, 1910.

PHILIP RAND, (Seal)

Notary Public.

NOTE—Each director when elected must take the oath of office and, under section 5147, U. S. R. S.,

the oath should be transmitted to the Comptroller of the Currency, immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTOR.

June 21, 1909, 28,000.

State of California,

County of Los Angeles,—ss.

I, the undersigned, Director of the First National Bank located at Salmon, Idaho, being a citizen of the United States, and resident of the State of Idaho, do solemnly swear (affirm) that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said Association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which this Association has been organized; and that I am the owner, in good faith and in my own right, of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

G. E. BOWERMAN.

Subscribed and sworn (affirmed) to before the undersigned this 26th day of January, 1910.

NELLIE C. BROWER, (Seal)

Notary Public.

NOTE—Each director when elected must take the oath of office, and under section 5147, U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTORS.

July 6-'08-10,000.

State of Idaho,

County of Lemhi,—ss.

We, the undersigned, Directors of the First National Bank, located at Salmon, State of Idaho, being citizens of the United States, and all residents of the State or Territory of Idaho, do, each for himself, and not one for the other, solemnly swear (affirm) that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said Association has been organized; and, each for himself, does solemnly swear that he is the owner in good faith, and in his own right, of the number of shares of stock required by said Statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

Signature.

- | | |
|-------------------|--------------------|
| 1. H. G. KING. | 3. N. I. ANDREWS. |
| 2. E. S. EDWARDS. | 4. J. C. SINCLAIR. |

Subscribed and sworn to this 12th day of January, 1909, before the undersigned, a Notary Public in and for said County. (Seal.)

FRANK L. PLUMMER,
Notary Public.

My commission expires February 24, 1912.

NOTE—Each director when elected must take the oath of office, and under section 5147, U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

July 6-'08-27,000.

OATH OF DIRECTOR.

State of California,
County of Monterey,—ss.

I, the undersigned, Director of the First National Bank, located at Salmon, Idaho, being a citizen of the United States, and resident of the State, or Territory, of Idaho, do solemnly swear that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said Association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which this Association has been

organized; and that I am the owner, in good faith and in my own right, of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

M. M. McPHERSON.

Subscribed and sworn to this 19th day of January, 1909, before the undersigned, a Notary Public in and for said County.

(Seal.)

F. W. ELLIS,

Notary Public.

NOTE—Each director when elected must take the oath of office, and under section 5147, U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTOR.

July 6-'08-27,000.

State of California,

County of Monterey,—ss.

I, the undersigned, Director of the First National Bank, located at Salmon, being a citizen of the United States, and resident of the State, or Territory, of Idaho, do solemnly swear that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said Association; that I will not knowingly violate, or willingly permit to be violated,

any of the provisions of the Statutes of the United States under which this Association has been organized; and that I am the owner, in good faith and in my own right, of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt.

A. J. MacNAB.

Subscribed and sworn to this 19th day of January, 1909, before the undersigned, a Notary Public in and for said County.

(Seal.)

F. W. ELLIS,

Notary Public.

NOTE—Each director when elected must take the oath of office, and under section 5147, U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTOR.

January 12-'05-2,000.

State of Idaho,

County of Lemhi,—ss.

I, the undersigned, Director of the First National Bank, located at Salmon, Idaho, in the State or Territory of Idaho, being a citizen of the United States, and resident of the State or Territory of Idaho, do solemnly swear that I will, so far as the duty de-

volves on me, diligently and honestly administer the affairs of said Association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which this Association has been organized; and that I am the owner, in good faith and in my own right, of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of the said Association; and that the same is not hypothecated or in any way pledged as security for any loan or debts.

JOHN LOTTRIDGE,

Place of residence: Salmon, Idaho.

Subscribed and sworn to this 22nd day of November, 1909, before the undersigned, a Notary Public in and for said County. (Seal.)

P. J. DEMPSEY,

Notary Public.

NOTE—Each director when elected must take the oath of office, and under section 5147, U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

OATH OF DIRECTOR.

July 6-'08-27,000.

State of Idaho,

County of Fremont,—ss.

I, the undersigned, Director of the First National Bank, located at Salmon, being a citizen of the Unit-

ed States, and resident of the State, or Territory, of Idaho, do solemnly swear (affirm) that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said Association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which this Association has been organized; and that I am the owner, in good faith and in my own right, of the number of shares of stock required by said Statutes, subscribed by me or standing in my name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debts.

G. E. BOWERMAN.

Subscribed and sworn to this 16th day of January, 1909, before the undersigned, a Notary Public in and for said County.

(Seal.)

BERD POWER,
Notary Public.

NOTE—Each director when elected must take the oath of office, and under section 5147, U. S. R. S., the oath should be transmitted to the Comptroller of the Currency immediately after the election. If the officer administering the oath has no seal, a certificate of the proper State, County or Court official to the effect that such officer is authorized to take acknowledgments must be attached.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

My name is Frederick V. Biscoe; residence, Salmon, Idaho; occupation, bookkeeper, and am employed by Frank R. McCormick, Receiver of the First National Bank, and have been since January 15, 1914. As such bookkeeper I have to do with the books and accounts and records of the First National Bank of Salmon, and am familiar with those books. The book I hold purports to be a record of the loans and discounts of the First National Bank of Salmon, between April 2, 1906, and June 1, 1911. In this book is a record of the loans taken over by the First National Bank of Salmon from the Langsdorf Bank, which was purchased by the First National Bank.

Q. Now, please read, Mr. Biscoe, the loans so taken over, which were in excess of \$5,000.00 to any one individual or firm or company.

Mr. Millsaps: We object to that, your Honor, as immaterial and incompetent and not tending to prove any issues in this case. We are not charged with taking over any loans from the bank, excessive loans from that bank.

The Court: I don't understand that to be the question. Is that the question?

Mr. Budge: Yes.

The Court: How is it material?

Mr. Budge: It is material in this: To show that the bank entered upon a course of mismanagement, and to show the date when this mismanagement commenced, and as charging the defendants with knowledge, either actual or constructive, of the mismanagement of the bank, long before the acts specifically

charged to have been wrongful were committed. Some of the Courts lay down the rule, or have laid down the rule in some cases, that where an act of mismanagement was an exception or was exceptional in its nature, or occurred within such a time that the directors might not be presumed to have knowledge of it, that there would be less responsibility attaching to the directors, under such circumstances, but if the mismanagement continued for a long period of time, and embraced transactions extending over several years, that the Board of Directors are held to accountability for failing to exercise the proper supervision and care to ascertain the condition of the bank.

The Court: I understand that principle, but I understand the objection to the question here is upon the ground that you are asking for what loans.

Mr. Budge: No, I am not asking for those loans. I am not asking to recover upon that ground.

The Court: But you were asking what loans taken over from Langsdorf and Company exceeded \$5,000.00.

Mr. Budge: Just simply for the purpose of showing that the bank here was making loans in excess of its statutory limit, and thereby mismanaging the bank.

The Court: But the bank didn't make these loans.

Mr. Budge: But it assumed them, your Honor, which would be just as blamable as to make the loans themselves.

The Court: The objection is sustained.

Mr. Budge: Note an exception.

The Court: You understand that I do not sustain this objection upon the ground that you cannot introduce evidence of similar acts to those charged, for the purpose of showing intent and knowledge, but I do not conceive that the taking over of the assets of this bank would involve transactions of a similar nature. I see nothing wrong in taking over the assets of this Company, even though those assets may have involved loans in excess of \$5,000.00.

Mr. Budge: I want to say to your Honor at this time, in this connection, that we have proof here to the effect that these loans were treated upon the same basis by the Comptroller of the Currency. I shall offer in this connection this paper which I shall have marked Plaintiff's Exhibit 4:

PLAINTIFF'S EXHIBIT NO. 4.

District of Columbia,

City and County of Washington,—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Thomas P. Kane, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original office record of letter dated August 10, 1909, addressed to the First National Bank, Salmon, Idaho, and of the whole of such original on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name, and caused my Seal of Office to be affixed

to these presents, at the Treasury Department in the City of Washington and District of Columbia, this 19th day of March, A. D. 1914. (Seal.)

T. P. KANE,

Acting Comptroller of the Currency.

Treasury Department.

Office of Comptroller of the Currency.

Form 2187—Ed. 500—F. C., July 23, '13.

TREASURY DEPARTMENT,
WASHINGTON.

L 8080

Aug. 10, 1909.

G. T.

President,

First National Bank,

Salmon, Idaho.

Sir:

The report of condition of your bank on June 23, 1909, shows the following loans in excess of one-tenth of its unimpaired capital stock and surplus:

J. W. Moore.....	\$16,000
I. O. O. F. No. 5.....	16,000
W. J. Wettenberg.....	10,000
H. W. Soule, et al.....	7,500
H. W. Soule, et al.....	7,500

Immediate arrangements must be made to reduce these loans to the statutory limit. An observance of the law in this respect is insisted upon and will be strictly enforced.

The directors are requested to unite in making a prompt reply in detail to this letter over their indi-

vidual signatures, stating that it has been read by them, and what steps will be taken to reduce these loans to the lawful limit.

Respectfully,
T. P. KANE,
Deputy Comptroller.

Excessive Loans.

Form 2248—Ed. Feb. 12-'08-4,500.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

The Court: In order that I may understand you, Mr. Budge, suppose that otherwise the purchase of the assets of this bank of Langsdorf & Co. was a good business investment, would have been such an investment as any good banker would justify, and suppose that among those assets were one or two loans in excess of \$5,000.00, do you contend that the purchase would have violated any law or any moral principle, or any principle of good business ethics?

Mr. Budge: Not particularly the purchase, your Honor, but I contend that it would have been necessary for the purchaser to have made arrangements, or such arrangements as might be necessary, so that this bank would not have assumed those excessive loans to any one individual, and that if it purchased the business of another bank, even though it were a good business proposition, that it would not be justified under the law in assuming responsibility indirectly which the law prevents it from assuming directly.

The Court: That wouldn't be assuming any responsibility; that is an asset and not a liability.

Mr. Budge: Yes, that may be true, your Honor, but it might become.

The Court: Well, if it does become—if thereafter the bank acted carelessly in handling these loans, that is another question. I am sustaining the objection now to the offer upon the ground that you are making the offer for the purpose of showing that by this act itself, the act of purchase, the directors were negligent. I cannot yield to the view that merely because there were among these assets so purchased loans which would be in excess of what these directors might make for the national bank, of which they were directors, that that would in itself constitute negligence. I think that would be extraordinary.

Mr. Budge: So that your Honor may understand my position more clearly, it may be that the First National Bank paid, we will say, the face value of some of these loans. Now, in that sense, if the bank were amply secure and the loan were absolutely good, and nothing was lost, everything would be all right about it; but assume, for instance, that such a loan had been made and such a loan had been purchased and a loss was sustained by the bank, then the other phase of the situation will be presented and the bank was blamable for taking over such a loan and making payment for it. If a loss did occur, they have assumed a responsibility by taking over a loan which might or might not be paid.

The Court: You can show that. You can show that they took over bad loans. You may show that they carelessly or wilfully paid an exorbitant price, and you may show that it was a bad transaction, for the purpose of fixing the blame upon the directors. In other words, you can show anything that would indicate they had acted carelessly or negligent, or in disregard of the rights or interests of the bank of which they were directors.

Mr. Budge: My contention is that it is presumed to be negligence under the statute when the loan which they assumed responsibility for was taken over.

The Court: I can't take that view.

Plaintiff's Exhibit 5 offered and received in evidence, also Plaintiff's Exhibit 4.

PLAINTIFF'S EXHIBIT NO. 5.

District of Columbia,

City and County of Washington,—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Thomas P. Kane, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter from The First National Bank, Salmon, Idaho, dated September 8, 1909, and of the whole of such original on file and of record in my office.

In Testimony Whereof, I have hereto subscribed my name, and caused my Seal of Office to be affixed to these presents, at the Treasury Department in the

City of Washington and District of Columbia, this
19th day of March, A. D. 1914. (Seal.)

T. P. KANE,
Acting Comptroller of the Currency.

Treasury Department.

Office of Comptroller of the Currency.

Form 2187.—Ed. 500—F. C., July 23-'13.

H. G. King, President. N. I. Andrews, Vice-Pres't.
Ray Edwards, Cashier.

THE FIRST NATIONAL BANK

Salmon, Idaho, September 8, 1909.

T. P. Kane, Deputy Comptroller,
Washington, D. C.

Sir:

Replying to your favor of the 10th ult., we beg to
say that the Notes of

J. M. Moore for.....\$16,000.00

I. O. O. F. for.....\$16,000.00

W. J. Wittenberg.....\$10,000.00

have been paid in full. The Soule et al. Notes were
taken by us from Langsdorf Company, Bankers,
when buying the bank and will receive attention at
maturity.

Yours truly,

JOHN C. SINCLAIR.

H. G. KING.

N. I. ANDREWS.

RAY EDWARDS.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

Mr. Biscoe: The first loans in excess of \$5,000.00 to any one person, firm or corporation, commencing with the month of March, 1909, is for \$5500.00 to W. H. Mulkey on October 18, 1909; on November 27th, 1909, Peter McKinney, \$14,000.00; on November 29th, Walter M. Grouell, \$500.00 and \$6,000.00 on the same date; on December 1, 1909, Bolts & Oltmer, one note for \$6,000.00, two notes for \$6,000.00, and one for \$500.00, all on December 1, 1909; on December 28, 1909, a loan to C. A. Carlson, \$6,000.00. Also on the same date a loan to F. E. Pattee, \$6,000.-00. On January 26, 1910, J. M. McPherson and H. S. Waters, a loan for \$8,000.00, also one for \$6,000.-00 on the same date, to the same parties. On February 2, 1910, to Mrs. A. Eckersell, a loan of \$3,000.00, and one for \$6,000.00, on the same date. On February 14, 1910, G. H. Monk & Co., a loan of \$8,000.00. On February 17, 1910, G. H. Monk & Co., \$6,000.00. On March 16, 1910, a loan was made to Peter McKinney, endorsed by W. H. Mulkey, \$7,100.00. On April 25, 1910, two loans made to W. Hammond, of \$1,000.00 and \$6,000.00, respectively. On July 6, 1910, there were two loans made to F. M. Pollard and S. A. Pollard, one of \$1,700.00, and the other of \$6,-250.00. On July 19, 1910, there were three loans made to H. W. Soule and others, of \$5,000.00 each. On December 10, 1910, loan made to the Salmon Lumber Company, \$6,000.00. On December 31, 1910, there were two loans made to L. T. Ramsey, one of \$6,000.00 and one of \$2,000.00. On January 12, 1911, there were two loans made to H. Brown, one of \$6,250.00 and one of \$6,500.00.

I have a record showing the overdrafts which were allowed by this bank between the 1st day of January, 1909, and the 8th day of June, 1911. Exhibits 6, 7 and 8 were compiled by me and represent to the best of my knowledge and belief the overdrafts shown on the ledgers of the First National Bank of Salmon, for the years 1909, 1910 and 1911, up to and including the 1st of May, and are correct as taken from the ledgers.

Plaintiff offered, and the same were received, in evidence the minutes of directors' meeting held January 12, 1909, shown on page 107 of the record book, also minutes of Board of Directors' meeting held Feb. 2nd, 1909, found at page 109; also the minutes of the Board of Directors of March 3, 1909, found at page 113, and the minutes of April 6th, of the Board of Directors, found at page 123, for the year 1909, and of May 4, 1909, at page 125, and the records of meetings of stockholders and directors, held between May 4, 1909, and June 7, 1911, inclusive, found at pages 127 to 194, both pages inclusive.

Plaintiff offered, and the same were received in evidence, the minutes of directors meeting held on January 18, 1910, and found at page 153.

"DIRECTORS' MEETING.

"The directors of the First National Bank of Salmon, elected at the stockholders' meeting held January 18, 1910, met at the bank January 18th, 1910, for the purpose of organization as a Board of Directors, the following directors being present: H. G.

King, N. I. Andrews, Geo. Buck, Fred Havemann, John Lottridge, J. C. Sinclair.

"The directors present having taken the oath of office required by law, proceeded with the organization of the board, and N. I. Andrews was elected chairman, and J. C. Sinclair secretary.

"H. G. King was then duly elected president of the bank, and his salary fixed at \$200.00 per month.

"N. I. Andrews was duly elected vice president of the bank, and his salary fixed at \$100.00 per month.

"John Lottridge was duly elected cashier of the bank, and his salary fixed at \$125.00 per month.

"Fred Havemann was duly elected assistant cashier, and his salary fixed at \$100.00 per month.

"J. C. Sinclair was duly elected secretary of the Board of Directors.

"H. G. King, N. I. Andrews and John Lottridge were duly appointed as a standing committee on loans and discounts, and an examining committee consisting of Geo. Buck, Fred Havemann and J. C. Sinclair was also appointed.

"The secretary then read a letter from the Comptroller of the Treasury, dated Washington, D. C., December 18, 1909, suggesting, among other matters, that the by-laws of the bank be amended so as to require the approval by the Board of Directors at the monthly meetings of all loans and discounts, and the recording of such approval in permanent form, and upon motion duly made and carried the following amendment to the by-laws was adopted by more

than a two-thirds majority of the board, all of the six directors present voting for such amendment.

“Resolved, that the by-laws of the First National Bank of Salmon be amended by adding Section 34, and which shall read as follows: The Board of Directors of the bank shall, at each monthly meeting, or oftener, examine and approve all loans and discounts, and such approval shall be recorded in a book kept for that purpose.” The officers of the bank having been duly elected, the board was duly organized.

“There being no further business for consideration, the meeting then adjourned.

“N. I. Andrews, Chairman. J. C. Sinclair, Secretary.”

(Biscoe) The indebtedness owing by the Salmon Lumber Company, on the 1st day of February, 1910, to the bank, was \$3500.00 upon a note. There is no record of it having ever been paid. There is a record of a loan of \$3500.00 outstanding on the 15th of February, 1910. Apparently on February 15, 1910, the account of the Salmon Lumber Company was overdrawn \$1597.92. On February 15, 1910, the Salmon Lumber Company gave a note to the First National Bank, numbered 2199, for \$2500.00.

Offered and received in evidence as Exhibit No. 9.

PLAINTIFF'S EXHIBIT NO. 9.

No. 2199.

Salmon, Idaho, July 1, 1910.

.....after date,
for value received, and without grace, I, we or either
of us promise to pay to the order of The First Na-

tional Bank of Salmon \$2500.00, Two Thousand Five Hundred Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of ten (10%) per cent per annum. Interest to be paid.....and, if not paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action.

SALMON LUMBER CO., LTD.,

By F. W. Carl, President.

C. D. Slaughter, Secretary.

Due.....No. 40.....190...

P. O.....

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

On July 27, 1910, there was a loan to the Salmon Lumber Company of \$3500.00, note No. 2475.

Offered and received in evidence as Exhibit No. 10.

PLAINTIFF'S EXHIBIT NO. 10.

No. 2475.

Salmon, Idaho, Nov. 2, 1910.

On demand after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$3500.00, Thirty-five Hundred Dollars, in lawful money of the United States of America, at The First

National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of ten (10%) per cent per annum, interest to be paid. and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action.

SALMON LUMBER CO., LTD.,

By C. D. Slaughter, Manager.

Due. No. 41. 190. . .

P. O.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

On December 10, 1910, there was a loan made to the Salmon Lumber Company, No. 2551, for \$6000.00.

On February 6, 1911, there was a loan made to the Salmon Lumber Company of \$3000.00, No. 2616.

Two last above mentioned notes offered and received in evidence as Exhibits No. 11 and 12, respectively.

PLAINTIFF'S EXHIBIT NO. 11.

No. 2551. Salmon, Idaho, December 10, 1910.

On demand after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$6,-

000.00, Six Thousand Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of ten (10%) per cent per annum. Interest to be paid semi-annually and, if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action.

SALMON LUMBER CO., LTD.,

By F. W. Carl, President.

C. D. Slaughter, Manager.

Due.....190...

P. O., Salmon, Ida.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT NO. 12.

No. 2616. Salmon, Idaho, January 4, 1911.

Six months after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$3000.00, Three Thousand Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of ten (10%) per cent per annum. Interest to be paidand if not so paid, the whole sum of

both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SALMON LUMBER CO., LTD.,

F. W. Carl, President.

C. D. Slaughter, Sec. and Mangr.

Due.....190...

P. O.....

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

A loan was made to the Pollards on July 11, 1910, for \$1700.00, being No. 2459, and also another note on the same date, to the same parties, F. M. and S. A. Pollard, No. 2460, note dated June 29th, 1910, for \$6250.00.

The two notes, being Exhibits No. 13 and 14, were admitted in evidence.

PLAINTIFF'S EXHIBIT NO. 13.

No. 2459. Salmon, Idaho, July 11, 1910.

On demand, after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$1700.00, Seventeen Hundred Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of

ten (10%) per cent per annum. Interest to be paid
and if not so paid, the whole sum of
 both principal and interest to become immediately
 due and collectible.

And in case suit is instituted to collect this note,
 or any portion thereof, we promise to pay, besides
 costs and disbursements allowed by law, such addi-
 tional sum as the Court may adjudge reasonable as
 attorney's fees in said suit or action.

Mrs. S. A. Pollard.

F. M. Pollard.

Due.....190...

P. O.....

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT NO. 14.

No. 2460. Salmon, Idaho, June 29, 1910.

Four months after date, for value received, and
 without grace, I, we or either of us promise to pay to
 the order of The First National Bank of Salmon,
 \$6250.00, Six Thousand Two Hundred and Fifty
 Dollars, in lawful money of the United States of
 America, at The First National Bank, Salmon,
 Idaho, with interest thereon in like money from date
 until paid, at the rate of ten (10%) per cent per an-
 num. Interest to be paid.....and if not so
 paid, the whole sum of both principal and interest
 to become immediately due and collectible.

And in case suit is instituted to collect this note,
 or any portion thereof, we promise to pay, besides

costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Mrs. S. A. Pollard.

F. M. Pollard.

Due.....No. 36.....190...

P. O.....

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

The records show a loan to Harry Brown on or about the 19th day of July, 1910, for \$3000.00. The number is 2474. The records do not show any payment of that loan. On January 12, 1911, there was another loan made to H. Brown, of \$6250.00, No. 2592, which was admitted in evidence as plaintiff's Exhibit 15.

PLAINTIFF'S EXHIBIT NO. 15.

No. 2592. Salmon, Idaho, January 2, 1911.

On demand, after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$6250.00, Six Thousand Two Hundred and Fifty Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of ten (10%) per cent per annum. Interest to be paid semi-annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs

and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Harry Brown.

Due.....190...

P. O.....

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

On July 1, 1910, Harry Brown was indebted on notes to the bank, in the amount of \$7500.00, represented by four notes; none of them have been paid. On the 19th of July, 1910, there was one note of Harry Brown outstanding for \$750.00; also one for \$1000.00; also one for \$3500.00. At the close of business on that day \$3000.00 outstanding discounted on that day; and on the 19th day of July, 1910, the account of Harry Brown was overdrawn \$603.80, according to the ledger. I have a list of overdrafts due the bank at the time the receivership commenced. (Reading.)

George W. Barfield, \$14.50; C. G. Black, \$.56; A. F. Brantegam, \$78.62; Fred Brough, \$52.19; Harry Brown, \$110.00; James W. Caperen, \$384.88; Alice Carl, \$3.65; Fred Carl ranch account, \$364.95; W. M. Carpenter, \$14.77; Fred Crandall, \$2.36; P. J. Dempsey, \$35.35; Guy Edwards, \$1.22; A. E. Everett, \$11.99; A. E. Ferguson, \$6.36; George Geertson, \$3.02; C. F. Hamner, \$127.12; J. L. Harmon, \$7.00. There are about three times as many as I have read. The total amount of overdrafts as shown by the books of the company, at the time of the failure

of the bank, was \$9,222.26. Of that amount, since the failure, \$5,241.37 has been collected, and the balance still outstanding is \$3980.89. I have attempted to collect these, and have written them repeatedly; others are out of the jurisdiction and they are execution proof. I have made inquiry to ascertain whether they had property subject to execution.

Dr. C. F. Hanmer has no property in Salmon or that section of the country. The amount of his overdraft is \$127.12.

The Idaho Coal & Land Company is not in existence now, and has no property that I know of.

John Lottridge resides in California, and has not any property in Salmon or thereabouts.

Allen C. Merritt resides at Salmon. I have made inquiry and can find no property belonging to him in the State of Idaho.

The Salmon Land & Mines Company is out of existence, and upon inquiry I find no property in Idaho.

Bert Summers resides at Salmon, Idaho, but I find no property in the State belonging to him.

Z. T. Vincent has no property.

John R. Wheeler has no property; Mira L. Wheeler, his wife, no property.

George G. Wicklund we foreclosed a mortgage on the last property he had. There was no equity whatever after the foreclosure, to satisfy this overdraft, and he has nothing now.

Fred Carl is a son-in-law of H. G. King, and has no property in the State of Idaho.

F. M. Pollard has nothing.

I made these investigations with respect to these various persons and others whose accounts were overdrawn, in accordance with my employment and at the request of the Receiver, and acting for him.

C. K. Slaughter is the daughter of the defendant, H. G. King. A. K. Carl is the daughter of H. G. King. F. W. Carl is H. G. King's son-in-law. J. M. C. Lottridge is H. G. King's son-in-law. C. D. Slaughter is H. G. King's son-in-law. I am not sure that J. M. C. Lottridge is a son-in-law of H. G. King; I do not know exactly how he is related. I knew Mr. Lottridge as John Lottridge.

Exhibits 17 and 18 received in evidence.

PLAINTIFF'S EXHIBIT NO. 16.
ARTICLES OF INCORPORATION OF THE SAL-
MON LUMBER COMPANY, LIMITED.

Know All Men by These Presents: That we, the undersigned, have this day voluntarily associated ourselves together for the purposes of forming a corporation, under the laws of the State of Idaho.

And We Hereby Certify:

First: That the name of said corporation is THE SALMON LUMBER COMPANY, LIMITED.

Second: The purposes of which this corporation is formed are to operate a lumber yard, to buy and sell all kinds of lumber and building materials, to buy and sell coal and feed stuff, to buy and sell and own real estate, to buy and sell and operate saw mills and saw mill machinery, and more particularly to operate a lumber yard in Salmon, Idaho.

Third: That the place where its principal business is to be transacted shall be Salmon, Lemhi County, Idaho.

Fourth: That the term for which it is to be in existence is fifty (50) years from and after the date of its incorporation.

Fifth: That the number of its directors shall be five (5) and the names and residences of those who are appointed for the first year are:

C. K. Slaughter, Salmon, Idaho.

A. K. Carl, Salmon, Idaho.

F. W. Carl, Salmon, Idaho.

J. N. C. Lottridge, Salmon, Idaho.

C. D. Slaughter, Salmon, Idaho.

Sixth: That the amount of the capital stock of this corporation shall be Twenty-five Thousand (\$25,000.00) Dollars, divided into two hundred and fifty (250) shares of the par value of ONE HUNDRED DOLLARS each.

Seventh: That the amount of said capital stock which has been actually subscribed is Five Thousand (\$5000) Dollars, and the following are the names of the persons by whom the same has been subscribed:

Names.	Shares.	Amount.
C. K. Slaughter.....	1	\$ 100.00
A. K. Carl.....	1	100.00
F. W. Carl	23	2,300.00
J. N. C. Lottridge.....	1	100.00
C. D. Slaughter	24	2,400.00
		<hr/>
		\$ 5,000.00

In Witness Whereof, We have hereunto set our hands and seals this 21st day of August, 1909.

C. K. SLAUGHTER.

A. K. CARL.

F. W. CARL.

J. N. C. LOTTRIDGE.

C. D. SLAUGHTER.

Signed, sealed and delivered in the presence of Frank L. Plummer.

State of Idaho,

County of Lemhi,—ss.

On this 23rd day of August, in the year of our Lord one thousand nine hundred and nine, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared C. K. Slaughter, A. K. Carl, F. W. Carl, J. N. C. Lottridge and C. D. Slaughter, known to me to be the persons whose names are subscribed to the within instrument, and they each duly acknowledged that they had executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day last above written.

FRANK L. PLUMMER,

(Seal)

Notary Public,

Lemhi County, Idaho.

No. 145, Salmon Lumber Co. Filed August 23rd, 1909. W. C. Smith, County Recorder. By J. L. Kirtley, Jr., Deputy.

State of Idaho,

County of Lemhi,—ss.

I, J. L. Kirtley, Jr., County Recorder, in and for

the State and County aforesaid, hereby certify that the above and foregoing is a full, true and complete copy of the Articles of Incorporation of the Salmon Lumber Company, which articles are designated at Number 145, which were filed and remained on file in my office. And I further certify that the right of said corporation to do business in the State of Idaho was forfeited on December 1, 1912, for failure to pay the annual license tax as evidenced by the certificate of the Secretary of State of the State of Idaho, dated the 24th day of December, 1912.

In Witness Whereof. I have hereunto set my hand and affixed my official seal this 20th day of February, 1915.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk of the District Court.

By.....Deputy.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for the
County of Lemhi.*

PLAINTIFF'S EXHIBIT NO. 17.

FRANK R. McCORMICK, Receiver for First National Bank, *Plaintiff,*

VS.

H. G. KING,

Defendant.

DEFAULT.

In This Action, The defendant, H. G. King, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint

8th day of August, 1911, the Honorable Comptroller of the Currency, in charge of the said bank, determined the same to be in an insolvent condition, and appointed a Receiver therefor, who thereupon took charge of the business of the said bank for the purpose of winding up its affairs, and that the said Frank R. McCormick, the plaintiff herein, is now the duly appointed, qualified and acting Receiver thereof.

II.

That at the time of the closing and suspension of the said bank, on or about the 8th day of June, 1911, and at the time of the appointment of a Receiver therefor, on or about the 8th day of August, 1911, the said H. G. King was the owner of and in the possession of 140 shares of the capital stock of the said First National Bank, of a par or face value of \$100.00 per share or a total of \$14,000.00 of the said capital stock, the same standing on the books of the said corporation in the name of the said H. G. King.

III.

That on or about the 11th day of January, 1911, the Honorable Comptroller of the Currency of the United States levied an assessment upon the capital stock and stockholders of the said First National Bank, to the full amount of the capital stock thereof, or the sum of \$100.00 upon each and every share of the capital stock of the said corporation, held or owned by such stockholders respectively, at the time of the failure of the said bank and directed the plain-

tiff, Receiver herein, to take all necessary proceedings to enforce the liability of the said shareholders, a copy of which order of the Comptroller is attached to this complaint, marked "Exhibit A," and is made a part thereof.

IV.

That on or about the 23rd day of January, 1912, the plaintiff made demand upon the defendant herein for the payment of the amount so levied upon the shares of the said H. G. King, under the order of the said Comptroller of the Currency, but the defendant has failed and refused and still fails and refuses to pay the said sum or any part thereof, and the whole sum of \$14,000.00 is now due and owing from the defendant to the plaintiff as Receiver for the said First National Bank of Salmon.

Therefore, the plaintiff demands judgment against the defendant for the sum of \$14,000.00, together with interest thereon from the 12th day of February, 1912, and for his costs of suit herein expended.

F. J. COWEN,
Residence, Salmon, Idaho,
Attorney for Plaintiff.

State of Idaho,
County of Lemhi,—ss.

Frank R. McCormick, being first duly sworn, deposes and says that he is the Receiver in charge of the affairs of the First National Bank of Salmon, the plaintiff herein, and makes this affidavit for and on its behalf; that he has read the foregoing com-

plaint and knows the contents thereof and that the same is true of his own knowledge.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 30th day of March, 1912.

(Seal)

J. P. NIXON, JR.,

Notary Public in and for Lemhi County, Idaho.

My commission expires May 6, 1914.

No. 8080.

Assessment Upon Shareholders.

TREASURY DEPARTMENT.

Office of Comptroller of the Currency.

IN THE MATTER OF THE FIRST NATIONAL
BANK OF SALMON, IDAHO.—“Exhibit A.”—
Washington, D. C., January 11, 1912.

To All Whom It May Concern:

Whereas, Upon a proper accounting by the Receiver, heretofore appointed to collect the assets of The First National Bank, of Salmon, Idaho, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders thereof to the extent hereinafter mentioned, as prescribed by Section 5151 and 5234 of the Revised Statutes of the United States.

Now, Therefore, By virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said, The First National Bank, of Salmon, Idaho, for Fifty

Thousand Dollars, to be paid by them ratably on or before the twelfth day of February, 1912, and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Frank R. McCormick, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In Witness Whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia, this eleventh day of January, A. D. 1912.

(Seal.)

LAWRENCE O. MURRAY,

Comptroller of the Currency.

(See inside.)

Office of the Receiver of the
First National Bank of Salmon, Idaho.

Salmon, Idaho, January 11, 1912.

You Will Please Take Notice, That the Comptroller of the Currency has levied an assessment upon the stockholders of the First National Bank, of Salmon, Idaho, of One Hundred Dollars (\$100) a share, payable at the office of the Receiver on or before February 12, 1912. The Receiver is, however, authorized by the Comptroller to grant an extension, without interest, to shareholders who pay 25 per cent of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed,

to pay 25 per cent additional on or before March 12, 1912; 25 per cent on or before April 12, 1912; and the remaining 25 per cent on or before May 12, 1912.

You are therefore requested to pay the assessment on.....shares of stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

.....
Receiver First National Bank, Salmon, Idaho.

To.....

Filed March 30th, 1912. J. L. Kirtley, Jr., Clerk.
 By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
 of the State of Idaho, in and for
 the County of Lemhi.*

FRANK R. McCORMICK, Receiver for The First
 National Bank of Salmon, *Plaintiff,*
 vs.
 H. G. KING, *Defendant.*

SUMMONS.

The State of Idaho Sends Greeting to the Above-named Defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Sixth Judicial District, State of Idaho, in and for the County of Lemhi, and to answer the complaint filed therein against you

(a copy of which is hereto attached) within twenty days (exclusive of the day of service) after the service on you of this summons, if served within this Judicial district; or if served elsewhere, within forty days. The said action is brought to obtain judgment for the sum of Fourteen Thousand (\$14,000.00) Dollars, together with interest thereon from the 12th day of February, 1912, assessment by Comptroller of the Currency, on 140 shares of stock of the said First National Bank, owned by you, all of which will more fully appear from the complaint on file herein, to which reference is hereby made.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for the amount demanded in the complaint.

Given under my hand and seal of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, this 23rd day of April in the year of our Lord one thousand nine hundred and twelve.

(Seal.)

J. L. KIRTLEY, JR., Clerk.

By.....

Deputy Clerk.

F. J. Cowen, Attorney for Plaintiff.

Salmon, Idaho, Residence.

State of Idaho,

County of Lemhi,—ss.

I hereby certify, that I received the within summons on the 24th day of May, 1912, and personally served the same on the 25th day of May, 1912, on

H. G. King, the defendant named in said summons, by delivering to H. G. King, the said defendant, personally, at Salmon, in the County of Lemhi, a copy of said summons, together with a copy of the complaint in said action, attached to said copy of summons.

Dated this 25th day of May, 1912.

JAMES MAHAFFEY, Sheriff.

Sheriff Fee:

To Copy Summons	\$.60
To Mileage . . . . .	.20
To Service	1.00
To Return . . . . .	.20
	<hr/>
	\$2.00

Filed May 27, 1912. J. L. Kirtley, Jr., Clerk.
By W. W. Simmonds, Deputy Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for the
County of Lemhi.*

FRANK R. McCORMICK, Receiver for The First
National Bank of Salmon, *Plaintiff,*
vs.

H. G. KING, *Defendant.*

PRAECIPE.

To the Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi.

Sir:

You will enter the default of the defendant, H. G. King, in the above entitled action and thereupon

enter judgment by default in favor of the plaintiff and against the said defendant as prayed for in the complaint on file in this action, for failure of the defendant to enter appearance in the said action, and make answer to the said complaint.

Dated this 8th day of July, 1912.

F. J. COWEN,
Residence: Salmon, Idaho,
Attorney for Plaintiff.

Filed July 8, 1912. J. L. Kirtley, Jr., Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FRANK R. McCORMICK, Receiver for The First
National Bank of Salmon, *Plaintiff,*
vs.

H. G. KING, *Defendant.*

JUDGMENT BY DEFAULT BY CLERK.

In this action the defendant, H. G. King, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the default of the said defendant, H. G. King, in the premises having been duly entered according to law, upon application of said plaintiff to the Clerk, judgment is hereby entered against said defendant, in pursuance of the prayer of said complaint.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that the said plaintiff do have and re-

cover from the said defendant the sum of Fourteen Thousand Three Hundred Ninety-seven and 46-100 Dollars (\$14,397.46), lawful money of the United States, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum ofDollars (\$.....).

Judgment rendered July 8, 1912.

(Seal.) J. L. KIRTLEY, JR., Clerk.

Filed July 8, 1912. J. L. Kirtley, Jr., Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FIRST NATIONAL BANK, by Frank R. McCormick,
Plaintiff,

vs.

H. G. KING, Defendant.

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the judgment entered into the above entitled action, and recorded in Judgment Book B of said Court, page 77, and I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand and seal of said Court this 27th day of July, A. D. 1912.

(Seal.) J. L. KIRTLEY, JR., Clerk.

Judgment Roll filed July 27, 1912.

J. L. Kirtley, Jr., Clerk.

Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, in favor of Frank R. McCormick, Receiver for the First National Bank of Salmon, plaintiff, and against H. G. King, defendant, for the sum of Fourteen Thousand Three Hundred Ninety-seven and 46-100 Dollars, with interest thereon at the rate of seven per cent per annum from the 8th day of July, A. D. 1912, together with the costs of suit taxed at.....Dollars, and the judgment roll filed in said case in said County, and judgment docketed in the Clerk's office of said Court, and the judgment roll filed in said case in said County, and judgment docketed in the Clerk's office of said Court, on the 8th day of July, 1912, and the sum of Seventeen Thousand One and 10-100 Dollars, is now (at the date of this writ) actually due on said judgment.

Now, you, the said Sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of said debtor; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your County belonging to H. G. King on the day whereon said judgment was docketed, in the said County, or at any time thereafter and make return of this writ within 60 days after your receipt thereof, with what you have done indorsed hereon.

In testimony whereof, I, J. L. Kirtley, Jr., Clerk of the said District Court, have hereunto set my hand

and affixed the seal of said Court, at the Court House in the County of Lemhi, State of Idaho, this 20th day of February, A. D. 1915.

(Seal.)

J. L. KIRTLEY, JR., Clerk.

By W. W. SIMMONDS, Deputy Clerk.

State of Idaho,

County of Lemhi,—ss.

I hereby certify that I received the within execution on the 20th day of February, 1915; I further certify that after due and diligent search and inquiry, I have been unable to find any property belonging to the within-named defendant, not exempt from execution in this County, out of which to make said judgment, and return herewith this writ not served.

Dated this 25th day of February, A. D. 1915.

THOS. J. STROUD,

Sheriff in and for Lemhi County.

L. A. VOGLER, Deputy.

State of Idaho,

County of Lemhi,—ss.

I, J. L. Kirtley, Jr., Clerk of the above-entitled Court, hereby certify that the above and foregoing is a full, true and complete copy of an execution issued out of this Court and the Sheriff's return thereon, as filed in this office on the 25th day of February, 1915.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Court this 4th day of March, 1915.

(Seal.)

J. L. KIRTLEY, JR., Clerk.

No. 644.

*District Court of the Sixth Judicial District, State
of Idaho, County of Lemhi.*

FRANK R. McCORMICK, Receiver for The First
National Bank of Salmon, *Plaintiff,*

vs.

H. G. KING, *Defendant.*

EXECUTION.

Judgment

Costs

Accruing Costs

Total

Filed February 25, 1915.

J. L. KIRTLEY, JR.,
Clerk District Court.

By W. W. SIMMONDS, Deputy.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

Exhibits 19, 20, 21 and 22 received in evidence.

PLAINTIFF'S EXHIBIT NO. 19.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FRANK R. McCORMICK, Receiver for The First
National Bank of Salmon, *Plaintiff,*

vs.

RAY EDWARDS, *Defendant.*

DEFAULT.

*In This Action, The defendant, having filed his de-
murrer herein, which was overruled by the Court,
and having failed to appear and further answer the*

(Seal.)

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

RAY EDWARDS, *Defendant.*

The plaintiff complains and for cause of action against the defendant alleges:

That the First National Bank of Salmon is a corporation duly organized and existing under the national banking laws of the United States, having a capital stock of \$50,000.00, divided into 500 shares of the par value of \$100.00 per share, and with its principal place of business at Salmon, in the County of Lemhi, State of Idaho, and has at all the times hereinafter mentioned been doing a general banking business at said Salmon City, until on or about the 8th day of June, 1911, when the said bank voluntarily suspended business; and that on or about the 8th day of August, 1911, the Honorable Comptroller

of the Currency, in charge of the said bank, determined the same to be in an insolvent condition, and appointed a Receiver therefor, who thereupon took charge of the business of the said bank for the purpose of winding up its affairs, and that the said Frank R. McCormick, the plaintiff herein, is now the duly appointed, qualified and acting Receiver thereof.

II.

That at the time of the closing and suspension of the said bank, on or about the 8th day of June, 1911, and at the time of the appointment of a Receiver therefor, on or about the 8th day of August, 1911, the said Ray Edwards was the owner of and in the possession of 25 shares of the capital stock of the said First National Bank, of a par or face value of \$100.00 per share or a total of \$2500.00 of the said capital stock, the same standing on the books of the said corporation in the name of the said Ray Edwards.

III.

That on or about the 11th day of January, 1911, the Honorable Comptroller of the Currency of the United States levied an assessment upon the capital stock and stockholders of the said First National Bank to the full amount of the capital stock thereof, or the sum of \$100.00 upon each and every share of the capital stock of the said corporation, held or owned by such stockholders respectively, at the time of the failure of the said bank and directed the plaintiff

Receiver herein, to take all necessary proceedings to enforce the liability of the said shareholders, a copy of which order of the Comptroller is attached to this complaint, marked "Exhibit A," and is made a part thereof.

IV.

That on or about the 23rd day of January, 1912, the plaintiff made demand upon the defendant herein, for the payment of the amount so levied upon the shares of the said Ray Edwards, under the order of the said Comptroller of the currency, but the defendant has failed and refused and still fails and refuses to pay the said sum or any part thereof, and the whole sum of \$2500.00 is now due and owing from the defendant to the plaintiff as Receiver for the said First National Bank of Salmon.

Wherefore, the plaintiff demands judgment against the defendant for the sum of \$2500.00, together with interest thereon from the 12th day of February, 1912, and for his costs of suit herein expended.

F. J. COWEN,

Residence: Salmon, Idaho,

Attorney for Plaintiff.

State of Idaho,

County of Lemhi,—ss.

Frank R. McCormick, being first duly sworn, deposes and says that he is the Receiver in charge of the affairs of the First National Bank of Salmon, the plaintiff herein, and makes this affidavit for and on its behalf; that he has read the foregoing complaint

and knows the contents thereof, and that the same is true of his own knowledge.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 30th day of March, 1912.

J. P. NIXON, JR.,

Notary Public in and for Lemhi County, Idaho.

(Seal.)

My commission expires May 6, 1914.

No. 8080.

Assessment Upon Shareholders.

TREASURY DEPARTMENT.

Office of Comptroller of the Currency.

IN THE MATTER OF THE FIRST NATIONAL
BANK OF SALMON, IDAHO.—Exhibit "A."—
Washington, D. C., January 11, 1912.

To All Whom It May Concern:

Whereas, Upon a proper accounting by the Receiver, heretofore appointed to collect the assets of the First National Bank, of Salmon, Idaho, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders thereof to the extent hereinafter mentioned, as prescribed by Section 5151 and 5234 of the Revised Statutes of the United States.

Now, Therefore, By virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said, the First National Bank, of Salmon, Idaho, for Fifty

Thousand Dollars, to be paid by them ratably on or before the twelfth day of February, 1912, and I hereby make demand upon each and every one of them for One Hundred Dollars upon each and every share of the capital stock of said association, held or owned by them respectively, at the time of its failure; and I hereby direct Frank R. McCormick, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In Witness Whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia, this eleventh day of January, A. D. 1912.

(Seal.)

LAWRENCE O. MURRAY,

Comptroller of the Currency.

(See inside.)

Office of the Receiver of the
FIRST NATIONAL BANK OF SALMON, IDAHO.

Salmon, Idaho, January 11, 1912.

You Will Please Take Notice, That the Comptroller of the Currency has levied an assessment upon the stockholders of The First National Bank, of Salmon, Idaho, of One Hundred Dollars (\$100) a share, payable at the office of the Receiver, on or before February 12, 1912. The Receiver is, however, authorized by the Comptroller to grant an extension, without interest, to shareholders who pay 25 per cent of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed,

to pay 25 per cent additional on or before March 12, 1912; 25 per cent on or before April 12, 1912; and the remaining 25 per cent on or before May 12, 1912.

You are therefore requested to pay the assessment on shares of stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

Receiver First National Bank, Salmon, Idaho.

To

Filed March 30, 1912. J. L. Kirtley, Jr., Clerk.
 By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
 of the State of Idaho, in and for
 the County of Lemhi.*

FRANK R. McCORMICK, Receiver for the First
 National Bank of Salmon, *Plaintiff,*

vs.

RAY EDWARDS, *Defendant.*

DEMURRER.

The defendant demurs to the complaint herein, and for cause of demurrer alleges:

That the complaint does not state facts sufficient to constitute a cause of action.

GEO. W. PADGHAM,
Attorney for Defendant,
 Residence: Salmon, Idaho.

198 *Frank R. McCormick, Receiver, etc., vs.*

Service of the above demurrer is admitted by receipt of a copy this 8th day of June, 1912.

F. J. COWEN,

Attorney for Plaintiff.

Filed June 8, 1912. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy.

FRANK R. McCORMICK, Receiver for the First
National Bank of Salmon, *Plaintiff,*

VS.

RAY EDWARDS,

Defendant.

In this action the demurrer of the defendant was submitted without argument and overruled by the Court, and the defendant, failing and refusing to plead further, it is ordered that judgment by default be and is hereby ordered entered in accordance with the prayer of the complaint.

State of Idaho,

County of Lemhi,—ss.

I, J. L. Kirtley, Jr., Clerk of the District Court, do hereby certify that the above and foregoing is one of the orders made on the 30th day of September, 1912, and entered in Record of Proceedings of the District Court, on page 95.

(Seal.)

J. L. KIRTLEY, JR., Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FRANK R. McCORMICK, Receiver for the First
National Bank of Salmon, *Plaintiff,*

VS.

RAY EDWARDS,

Defendant.

JUDGMENT BY DEFAULT.

This cause came on regularly for trial on the 30th day of September, 1912, to be heard before the Court sitting without a jury, and the demurrer of the defendant submitted without argument, and said demurrer was overruled by the Court, and the defendant, failing and refusing to further answer the plaintiff's complaint herein, it is ordered that the default of the defendant be and is hereby duly entered according to law, and that the plaintiff have judgment in accordance with the prayer of the complaint.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed, that the plaintiff have and recover from the said defendant the principal sum of \$2500.00, with interest thereon at the rate of 7% per annum from the 12th day of February, 1912, amounting to the further sum of \$131.25, or a total sum of \$2631.25, together with the plaintiff's costs and disbursements herein, amounting to \$15.80, for which sums execution may issue.

Judgment entered November 14, 1912.

(Seal.) J. L. KIRTLEY, JR., Clerk.

Filed November 16, 1912. J. L. Kirtley, Jr., Clerk.
By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FRANK R. McCORMICK, Receiver for the First
National Bank of Salmon, *Plaintiff,*

vs.

RAY EDWARDS,

Defendant.

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the judgment entered into the above entitled action, and recorded in Judgment Book B of said Court, page 91. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action.

Witness my hand and the seal of said Court this 18th day of November, A. D. 1912.

(Seal.) J. L. KIRTLEY, JR., Clerk.

By W. W. SIMMONDS, Deputy Clerk.

No. 645. Judgment Roll. Filed November 18, 1912. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy Clerk.

State of Idaho,
County of Lemhi,—ss.

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of the said State, in and for said County, do hereby certify that the foregoing is a true copy of the judgment entered into the above entitled action, and recorded in Judgment Book B of said Court, page 91. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action. And I still further certify that no satisfaction or partial satisfaction has ever been entered upon the records relating to the judgment herein incorporated.

In Witness Whereof, I have hereunto set my hand

and affixed my official seal this 20th day of February,
1915.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT NO. 20.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FRANK R. McCORMICK, Receiver for the First
National Bank of Salmon, *Plaintiff,*

vs.

RAY EDWARDS, *Defendant.*

EXECUTION.

To the Sheriff of Lemhi County, Greetings:

Whereas, on the 14th day of November, A. D. 1912, a judgment was rendered in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, in favor of Frank R. McCormick, Receiver for the First National Bank of Salmon, plaintiff, and against Ray Edwards, defendant, for the sum of Twenty-five Hundred Dollars, with interest thereon at the rate of seven per cent per annum from the 12th day of February, A. D. 1912, together with the costs of suit, taxed at Fifteen and 80-100 Dollars, and the judgment roll filed in said case in said County, and judgment docketed in the Clerk's office of said Court, on the 12th day of November, 1912, and the sum of Three Thousand

Sixty-three and 89-100 Dollars, is now (at the date of this writ) actually due on said judgment.

Now, you, the said Sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of said debtor; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your County belonging to Ray Edwards on the day whereon said judgment was docketed, in the said County, or at any time thereafter, and make return of this writ within 60 days after your receipt thereof, with what you have done indorsed hereon.

In testimony whereof, I, J. L. Kirtley, Jr., Clerk of the said District Court, have hereunto set my hand and affixed the seal of said Court, at the Court House in the County of Lemhi, State of Idaho, this 20th day of February, A. D. 1915.

(Seal.)

J. L. KIRTLEY, JR., Clerk.

By W. W. SIMMONDS, Deputy Clerk.

State of Idaho,
County of Lemhi,—ss.

I hereby certify that I received the within execution on the 20th day of February, 1915, and, after due and diligent search and inquiry, I have been unable to find any property belonging to the within-named defendant, not exempt from execution, in the County of Lemhi, out of which to satisfy said judg-

ment, or any part of said judgment, and herewith return this writ not satisfied.

Dated this 25th day of February, A. D. 1915.

THOMAS J. STROUD, Sheriff.

L. A. VOGLER, Deputy.

State of Idaho,
County of Lemhi,—ss.

I, J. L. Kirtley, Jr., Clerk of the above-entitled Court, hereby certify that the above and foregoing is a full, true and complete copy of an execution issued out of this Court and the Sheriff's return thereon, as filed in this office on the 25th day of February, 1915.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court on this the 4th day of March, 1915.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk.

Endorsed: Filed Feb'y 25, 1915. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy.

PLAINTIFF'S EXHIBIT NO. 21.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Corporation, by Frank R. McCormick, Receiver,
Plaintiff,

vs.

HARRY BROWN, *Defendant.*

DEFAULT.

In This Action, the defendant, Harry Brown, having been regularly served with process, and having

Attest: My hand and the seal of the said Court
this 28th day of September, A. D. 1914.

J. L. KIRTLEY, JR., Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Corporation, by Frank R. McCormick, Receiver,
Plaintiff,

VS.

HARRY BROWN.

Defendant.

COMPLAINT.

The plaintiff complains, and, for cause of action against the defendant, alleges:

I.

That the First National Bank of Salmon is a corporation duly organized and existing under the national banking laws of the United States, and with its principal place of business at Salmon, in the County of Lemhi, State of Idaho, and has at all the times hereinafter mentioned been doing a general banking business at said Salmon until on or about the 8th day of June, 1911, when the said bank voluntarily sus-

pending business; and that, on or about the 8th day of August, 1911, the Honorable Comptroller of the Currency of the United States, in charge of the said bank, determined the same to be in an insolvent condition, and appointed a Receiver therefor, which Receiver thereupon took charge of the business of the said bank for the purpose of winding up its affairs, and the said Frank R. McCormick, the plaintiff herein, is now the duly appointed, qualified and acting Receiver thereof for the said purpose.

II.

That, on or about the 2nd day of January, 1911, the defendant, Harry Brown, made, executed and delivered to the said First National Bank of Salmon, his certain promissory note, wherein and whereby he agreed to pay to the said First National Bank, on demand, the sum of \$6500.00, with interest thereon at the rate of 10 per cent per annum; and the said defendant further agreed therein that in case suit should be instituted to collect the said note, or any part thereof, he would pay such additional sum as the Court might adjudge reasonable as an attorney fee in said suit or action; which said note is in words and figures as follows:

No. 5595. Salmon, Idaho, January 2, 1911.

On demand, after date, for value received, and without grace, I, we or either of us promise to pay to the order of the First National Bank of Salmon, \$6,500.00, Six Thousand Five Hundred Dollars, in lawful money of the United States of America, at the First National Bank, Salmon, Idaho, with interest

thereon in like money from date until paid, at the rate of 10 per cent per annum, interest to be paid semi-annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

(Signed:) HARRY BROWN.

Due.....190...

P. O.....

III.

That the defendant has not paid the said note, nor any part thereof, and the whole of the said principal sum of \$6,500.00, together with interest thereon from the 2nd day of January, 1911, is now due and owing from the defendant to the plaintiff herein.

IV.

That the payment of the said note was demanded of the said defendant on or about the 11th day of August, 1911, but the defendant has failed and refused to pay the same.

V.

That \$500.00 is a reasonable attorney's fee to be allowed to the plaintiff for the collection of said note in this action.

For a second and further cause of action against the defendant, the plaintiff complains and alleges:

I.

The plaintiff re-alleges paragraph one of its first cause of action herein, and makes the same part of this second cause of action.

II.

That on or about the 2nd day of January, 1911, the defendant, Harry Brown, made, executed and delivered to the First National Bank of Salmon, his certain promissory note, wherein he promised and agreed to pay to the said First National Bank, on demand, the sum of \$6,250.00, with interest thereon, at the rate of 10 per cent per annum; and the said defendant further agreed therein that in case suit should be instituted to collect the said note, or any part thereof, he would pay such additional sum as the Court might adjudge reasonable as an attorney's fee in said suit or action; which said note is in words and figures as follows:

No. 5595. Salmon, Idaho, January 2, 1911.

On demand, after date, for value received, and without grace, I, we or either or us promise to pay to the order of The First National Bank of Salmon, \$6,250.00, Six Thousand Two Hundred Fifty Dollars, in lawful money of the United States of America, at the First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of 10 per cent per annum, interest to be paid semi-annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

(Signed:) HARRY BROWN.

Due.....190...

P. O.....

III.

That the defendant has not paid the said note, nor any part thereof, and the whole of the said principal sum of \$6,250.00, together with interest thereon, from the defendant to the plaintiff herein.

IV.

That the payment of the said note was demanded of the said defendant on or about the 11th day of August, 1911, but the defendant has failed and refused to pay same.

V.

That \$500.00 is a reasonable attorney's fee to be allowed to the plaintiff for the collection of said note in this action.

Wherefore, The plaintiff demands judgment against the defendant, for the sum of \$12,750.00, with interest thereon at 10 per cent, from the 2nd day of January, 1911, and for the sum of \$1,000.00 as attorney's fees in this action, together with plaintiff's costs and disbursements incurring herein.

F. J. COWEN,

Residence: Salmon, Idaho,

Attorney for Plaintiff.

State of Idaho,
County of Lemhi,—ss.

Frank R. McCormick, being first duly sworn, deposes and says: That he is the Receiver of the First National Bank of Salmon, a corporation, plaintiff herein, and makes this affidavit for and on its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same he believes to be true.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 18th day of June, 1913. ENOCH W. WHITCOMB,
(Seal.) *Notary Public.*

No. 759. Filed June 18, 1913. J. L. Kirtley, Jr.,
Clerk. By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Corporation, by Frank R. McCormick, Receiver,
Plaintiff,

VS.

HARRY BROWN, *Defendant.*

I, A. L. Kirk, being duly sworn, deposes and says: That he is, and at all times mentioned herein was, over the age of twenty-one years, and not a party to the within action; that he received the within and hereunto annexed summons on the 9th day of January, 1914, and personally served the same upon Harry Brown, the within-named defendant, on the

210 *Frank R. McCormick, Receiver, etc., vs.*

17th day of June, 1914, by showing the within original and delivering a copy thereof, together with a copy of the complaint in the said action, to the said Harry Brown, personally, in the County of Lemhi, State of Idaho.

(Seal.)

A. L. KIRK.

Subscribed and sworn to before me this 15th day of July, 1914.

PERCY ANDERSON,

(Seal.)

Notary Public.

My commission expires March 25, 1918.

IN THE DISTRICT COURT.

*In the District Court of the Sixth Judicial District,
State of Idaho, County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Corporation, by Frank R. McCormick, Receiver,
Plaintiff,

vs.

HARRY BROWN,

Defendant.

SUMMONS.

The State of Idaho Sends Greeting to the Above-named Defendant.

You are Hereby Required to Appear In an action brought against you by the above-named plaintiff in the District Court of the Sixth Judicial District, State of Idaho, in and for the County of Lemhi, and to answer the complaint filed therein against you (a copy of which is hereto attached) within twenty days (exclusive of the day of service) after the service on you of this summons, if served within this judicial district; or, if served elsewhere, within forty days.

The said action is brought to obtain judgment against the defendant for the sum of \$12,750.00, with interest thereon from January 2, 1911, the same being due on two certain promissory notes, and for the sum of \$1000.00 as attorney's fees and for plaintiff's costs and disbursements incurred herein.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you as demanded in the complaint, a copy of which is hereto attached, and to which reference is hereby made.

Given under my hand and seal of the said District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, this 18th day of June, in the year of our Lord one thousand nine hundred and thirteen.

(Seal.)

F. J. COWEN,

Attorney for Plaintiff.

Salmon, Idaho, Residence.

J. L. KIRTLEY, JR., Clerk.

Filed: No. 759. Jan'y 22nd, 1914. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy Clerk.

*In the District Court of the Sixth Judicial District
of Idaho, in and for the County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Corporation, by Frank R. McCormick, Receiver,
Plaintiff,

vs.

HARRY BROWN,

Defendant.

JUDGMENT BY DEFAULT.

In this action the defendant, Harry Brown, having been regularly served with summons and having failed to appear and answer the plaintiff's complaint, the legal time for answering having expired and the default of the defendant, Harry Brown, having been ordered and duly entered according to law, upon application of the plaintiff to the Court, judgment is hereby entered against the said defendant, Harry Brown, in pursuance of the order of the Court, in the sum of Seventeen Thousand Four Hundred Ninety-eight and 39-100 Dollars (\$17,498.39), principal and interest, together with One Thousand Dollars (\$1,000.00) as attorney's fees.

Wherefore, By virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that the said plaintiff do have and recover from the said defendant the sum of Eighteen Thousand Four Hundred Ninety-eight and 39-100 Dollars (\$18,498.39), with interest at the rate of seven per cent per annum from date until paid.

Judgment rendered September 28, 1914.

Witness, the HONORABLE J. M. STEVENS,
(Seal.) *Judge.*

By J. L. KIRTLEY, JR., Clerk.

Judgment filed December 14, 1914.

J. L. Kirtley, Jr., Clerk.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Cor-
poration, by Frank R. McCormick, Receiver,
Plaintiff,

vs.

HARRY BROWN, *Defendant.*

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in Judgment Book B of said Court, page 180. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action.

Witness my hand and the seal of said Court this
14th day of Dec., A. D. 1914.

(Seal.) J. L. KIRTLEY, JR., Clerk.

No. 759. Judgment Roll filed Dec. 14, 1914.

J. L. Kirtley, Jr., Clerk.

State of Idaho,
County of Lemhi,—ss.

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of said State, in and for said County, do hereby certify that the foregoing is a true copy of the judgment entered into the above-entitled action, and recorded in Judgment Book B of said Court, page 180, and I further certify that the foregoing papers hereto annexed constitute the

judgment roll in said action. And I still further certify that no satisfaction or partial satisfaction has ever been entered upon the records relating to the judgment herein incorporated.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 20th day of February, 1915.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT NO. 22.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

FIRST NATIONAL BANK OF SALMON, a Corporation, by Frank R. McCormick, Receiver,
Plaintiff,

VS.

HARRY BROWN, *Defendant.*

EXECUTION.

To the Sheriff of Lemhi County, Greeting:

Whereas, on the 28th day of September, A. D. 1914, a judgment was rendered in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Lemhi, in favor of the First National Bank of Salmon, by Frank R. McCormick, Receiver, plaintiff, and against Harry Brown, defendant, for the sum of Eighteen Thousand Four Hundred and Ninety-eight and 39-100 Dollars, with interest thereon at the rate of seven per cent per

annum from the 28th day of September, A. D. 1914, and the judgment roll filed in said case in said County and judgment docketed in the Clerk's office of said Court on the 14th day of December, 1914, and the sum of Eighteen Thousand Nine Hundred Eighty-two and 64-100 Dollars is now (at the date of this writ) actually due on said judgment.

Now, you, the said Sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of said debtor; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your County belonging to Harry Brown on the day whereon said judgment was docketed, in the said County, or at any time thereafter, and make return of this writ, within sixty days after your receipt thereof, with what you have done indorsed hereon.

In Testimony Whereof, I, J. L. Kirtley, Jr., Clerk of the said District Court, have hereunto set my hand and affixed the seal of said Court, at the Court House in the County of Lemhi, State of Idaho, this 12th day of February, A. D. 1915.

(Seal.) J. L. KIRTLEY, JR., Clerk.

By W. W. SIMMONDS, Deputy Clerk.

State of Idaho,
County of Lemhi,—ss.

I hereby certify that I received the within execution on the 12th day of February, 1915; that, after due and diligent search and inquiry, I have been un-

able to find any property belonging to the within-named defendant not exempt from execution in this County out of which to make said judgment, and herewith return this writ not served.

Dated this 25th day of February, A. D. 1915.

THOMAS J. STROUD, Sheriff.

L. A. VOGLER, Deputy.

State of Idaho,

County of Lemhi,—ss.

I, J. L. Kirtley, Jr., Clerk of the above-entitled Court, hereby certify that the above and foregoing is a full, true and complete copy of an execution issued out of this Court, and the Sheriff's return thereon, as filed in this office on the 25th day of February, 1915.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Court this 4th day of March, 1915.

J. L. KIRTLEY, JR.,

Clerk District Court.

No. 759. Filed February 25, 1915. J. L. Kirtley, Jr., Clerk District Court. By W. W. Simmonds, Deputy.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

Frederick V. Biscoe, being first duly sworn as a witness for the plaintiff, testified as follows:

On Dec. 31, 1909, undivided profit account was charged with the Langsdorf & Company premium, \$14,500.00.

With reference to the overdrafts uncollected which I heretofore stated amounted to approximately \$3,-

900.00, I should think that it is practically all uncollectible. I have computed the balance due on the loans made to the Salmon Lumber Company. The total amount due is \$13,629.20 principal, and \$5,408.62 interest. The amount due on the Brown loans is \$11,760.25 principal, and \$5234.81 interest. The amount due on the Pollard loans is \$7800.00 principal, and \$3626.42 interest.

Mr. Budge: I desire to offer pages 107 to 194, both pages inclusive, of minute book marked Plaintiff's Exhibit No. 23, for the purpose of showing that no report was ever made to the board of directors by any loans and discount committee or by any examining committee, which should have reported, according to the terms of the by-laws, as well as for the purpose of showing the approval of the loans that were made during the period by the board of directors who attended these meetings, and their approval of the overdrafts which are shown in the statements set forth in the minutes of these various meetings, and for any other purpose for which these minutes may be competent, in support of the allegations of the bill. I don't know that there are any other respects in which it would be competent, but if there are any others.

Mr. Richards: We object to these so far as the defendant Bowerman is concerned, as there is no evidence to show that he had knowledge at any time of any of these matters offered from the exhibit.

The Court: The offer will be received, subject to this objection, and we can determine ultimately whe-

ther or not any connection has been shown so far as the defendant Bowerman is concerned.

There was then offered and received in evidence the record of the special meeting of the board of directors, as shown at page 173 of Exhibit 23, in support of the allegation of the bill that a dividend of \$2500 was declared and the sum of \$5,000 carried to the surplus account of the bank, said special meeting being held on the 9th day of July, 1910.

There was then offered and received in evidence the minutes of the directors' meeting held on the 18th day of January, 1910, shown at page 153 of Plaintiff's Exhibit 23, to show that the salary of the defendant King as President of the bank was fixed at \$200 per month; that of the defendant Andrews at \$100.00 per month, as Vice President.

Cross-examination:

The balance due on the loans to the Salmon Lumber Company has not been paid because the Salmon Lumber Company is at present in the hands of a Receiver. I don't know whether the Receiver has any funds on hand or not. That is why it hasn't been paid. I think there was an inventory of the lumber in the hands of the lumber company about the time the bank failed. I have no personal knowledge what it showed. I think possibly Mr. McCormick has a record of it in the bank. I don't know.

Q. Now, taking up the Langsdorf and Company matter, you mentioned the Mulkey loan for \$5,500.00 as an excess loan, I believe.

A. The question was asked me to read all loans taken from Langsdorf & Company over \$5000, which I did. I think the register will show when that was paid. The J. N. Moore loan of \$16,000.00 was paid on August 2, 1909. It was purchased on April 15, 1909. The loan to the Independent Order of Odd Fellows, \$16,000.00, was paid on the 28th day of June, 1909. The W. J. Wittenburg loan for \$10,000.00 was paid July 29, 1909, and was purchased on April 15, 1909. The loan of October 18, 1909, to Mulkey, \$5500.00, was paid twice, according to this record here. It was paid June 4, 1910, and December 2, 1910.

Q. Taking the loan of November 27, 1909, to McKinney, for \$15,000.00.

Mr. Budge: I think this is immaterial, if Your Honor please. We don't claim anything for any of these loans.

Mr. Richards: But you claim carelessness. They were paid within 60 and 90 days after they were made.

Mr. Budge: The fact that the loans were made and that they were excess loans shows carelessness and negligence and violation of the by-laws, and violation of the law, and it don't make any difference if they were paid fifteen minutes after they were made. The offense was complete, and there was carelessness and mismanagement of the bank.

The Court: Your contention extends only to the proposition that the making of the excess loan, even though it was promptly collected and nothing was lost, constitutes negligence?

Mr. Budge: Yes.

The Court: And you don't claim anything further?

Mr. Budge: Don't claim anything further so far as losses are concerned from those loans.

The Court: Upon that statement, the objection is sustained.

Q. Calling your attention to the Mulkey loan of October 18, 1909, for \$5500.00, was that an excess loan at that time?

Mr. Budge: That is a mere conclusion.

The Court: Overruled.

Mr. Richards: He read it as an excess loan.

A. I am not in a position to say what an excess loan is.

The Court: If that is the situation, this evidence will be considered only on the promise of showing that it was an excess loan. Of course if you don't ultimately show that it was an excess loan, it will be stricken out.

Mr. Richards: Well, there are quite a lot of them in the same shape.

The Court: Well, all of them. In other words, it will be understood that up to the present time there is no evidence that any of these loans were excess loans.

Mr. Budge: I don't understand the statement, Your Honor, in view of the proof, and to satisfy myself I want to know the position of the Court, and therefore make the inquiry. It is conceded by the pleadings that the capital stock was \$50,000.00. We

have introduced proof here, for instance, of a loan of \$14,000.00, and obviously it is excessive. It can't help but be excessive, because the law says no loan to one person shall exceed \$5000.00.

The Court: Does it say so?

Mr. Budge: Yes, the statute fixes 10 per cent of the capital stock.

The Court: Where is the statute?

Mr. Richards: And it says a surplus—

Mr. Budge: It says nothing about surplus. Even if it did say that, it is still excessive. As shown by the books of the company that have been introduced here, and the minutes, and the financial statement of the bank, it is still excessive, taking into consideration the surplus.

The Court: Then, Mr. Budge, in order that you may understand me, and I you, you were objecting to the witness answering this question. Now we must either assume that you have made proof or that you haven't. If you haven't undertaken to make proof that this is an excessive loan, then I will sustain the objection. If you put this witness on the stand not only for the purpose of showing that a loan was made, but that it is an excess loan, then his testimony is subject to cross-examination.

Mr. Budge: Yes, but the records show that it is. I claim that the proof shows that these are excess loans. But the witness couldn't answer whether they were excessive, because it is shown by the record, and it isn't a matter particularly within the knowledge of the witness, because it is shown by the rec-

ords what amounts have been carried to the surplus of the bank, and what its capital is.

The Court: If that has been shown, it hasn't been brought to my attention, as to what the surplus is. I am not advised at the present time what the surplus was.

Mr. Budge: I can call to your Honor's attention the various dates in the minutes for which the offer was made, the various dates when certain amounts were placed to the surplus.

The Court: I think I will overrule the objection, and permit counsel to go into the matter. Perhaps I will get the facts that way more easily than the other.

(Last question read.)

Mr. Budge: If I might suggest, the pleading, in paragraph 2, alleges that the directors of the bank created a surplus fund on the books of said bank in the sum of \$15,000.00, at the following times: \$1,000.00 on the 7th day of January, 1908; \$4000.00 on the 5th day of January, 1909; \$5000.00 on or about the 5th day of February, 1909—all of which are admitted by the pleadings—and \$5000.00 on or about the 9th day of July, 1910, which I just now offered, which is denied by the defendant Bowerman, but by nobody else, so that this pleading, with its admission, establishes what the surplus of the bank was.

Mr. Richards: \$65,000.00.

The Court: Perhaps that is true then.

Mr. Budge: So that with the admissions fixing it

at \$65,000.00, it would show that there were excess loans, by showing the amount of these various loans that were made.

Mr. Richards: This was \$5500.00, and the excess with the capital made \$65,000.00.

The Court: Of course, if the facts are shown, that would be a matter of argument, as to when there was an excess loan and what it was.

Mr. Richards: Q. February 2, 1910, Mrs. Eckerson, \$3000.00, and the same date, as I understood you to give it, Mrs. Eckerson, \$6000.00. Is that correct, or did you mean Mr. Eckerson?

A. The record shows Mrs. The notes have been paid. It is not to my knowledge a fact, that, notwithstanding the record, one was Mr. Eckerson and the other Mrs. Eckerson.

As to the Hammond loan of April 25, 1910, for \$1000.00, and again, the same date, the same person, for \$6000.00, it is not a fact according to this ledger that those were two separate loans to separate individuals. There are ditto marks underneath and no other initial in it. I don't know anything further than what the record shows as to whether it was a separate loan. It is supposed to show the individual names. It shows the initials in that case.

Q. One is Wellington and the other is William?

A. This reads "W. Hammond," and ditto marks underneath. It is simply "W."

Cross-examination by Mr. Whitcomb:

I have lived in Salmon nearly six years. Came there in June, 1909. Am not acquainted with George

W. Barfield. I know nothing about his financial circumstances. The effort that I made to ascertain as to his financial circumstances was that I inquired for his address and couldn't get it. That is as far as I went. I think I have seen letters to him. I wouldn't swear to it. From my absolute knowledge I couldn't say as to his financial ability to pay.

I am acquainted with Fred Brough. I am acquainted with his financial status in Lemhi County. I had our attorney examine the records and found out that he had a building on Main street which was mortgaged for \$5000.00 and that that was all the personal property he had, and he is heavily in debt otherwise. I was told it wouldn't pay us to bring suit against him on account of his having so little equity in the building. I obtained this information through the attorney. I didn't look up the records personally. I have heard he was engaged more or less in mining in that county. I don't know that he owns some mines there. I did not hear about his bringing ore out of there this last year. I didn't hear of his shipping ore from the Leesburg district, so-called. I didn't know anything about that. I relied entirely on the attorney.

Mr. F. C. Hanmer is a practicing physician in Salmon. I made the same effort to find out his financial standing or ability to pay—through our attorney—and also by personal solicitation for the amount. He told me it was impossible for him to pay anything at the present time. He has, according to the attorney, nothing that we could get. I understand that

his automobile is in his brother's name. He has a shack building on the west side of the river. The only effort I made to ascertain what his interest was in the ground on which the shack is situated was, as before, through our attorney.

Mr. J. L. Hammond is not a resident of Salmon, now. He was there for some length of time. So far as I know, he is an unmarried man. I have had letters returned. I don't know him personally. I have not been able to reach him. He didn't work in the same block where I have worked, not to my knowledge.

I am acquainted with George Leabo. His financial standing, I believe, is good, but the overdraft is disputed. We have never brought suit to test the question.

I am acquainted with John Lottridge. The effort I have made to ascertain what his financial standing has been was through our attorney. I have never looked the matter up personally. No funds have come into our office belonging to John Lottridge, not to my knowledge. I was never personally indebted to John Lottridge for money or on account of property claimed by John Lottridge.

I can't say anything about Mr. McCormick. Personally, I never have been.

I am acquainted with W. W. Schultz. I believe we have nearly everything he has as security for some notes we hold of his. That overdraft is not covered by the security. I wouldn't like to say that our security is more than sufficient to cover the notes which

we hold. I think not. It is purely a question of opinion on my part.

I am acquainted with Mr. Z. T. Vincent. I think he resides in New Mexico at the present time. I am not sure about that. He is an Episcopal minister. I have written him on several occasions and received answers saying that at the present time he was unable to pay, he had nothing whatever. He never disputed the bill. The last communication received from him, I should say, was about last June.

I am acquainted with John R. Wheeler. I don't know where he resides at the present time. I have heard that at one time he resided in the city of Pittsburgh, Pennsylvania. I have heard him make the claim that he owned real property in that city. I haven't endeavored to ascertain whether this bill would be collectible against any property which he owned in that city. I don't know where he is at the present time.

I am acquainted with Joseph G. Wicklund. I have made efforts toward ascertaining his financial worth in Lemhi County through our attorney—no personal investigation.

Q. Do you hold anything, or does your bank hold anything as security for this overdraft or any indebtedness which Mr. Wicklund owes the bank?

A. We hold security for a note on which we got judgment. The amount of the note is somewhere around \$1800.00. We have had judgment on it and foreclosed the mortgage. Only part of the property

has been sold. I believe we have some stock in some lime and brick company as security for the note turned over to us by Mr. Wicklund.

My understanding with respect to the lime claim up the Lemhi River is that it was taken up, and the assessment work hasn't been done on it, so I don't know whether they hold it now. I know they did hold it some time ago. I couldn't say personally how long they held it. I don't think they hold it now. I believe Mr. McCormick has made an effort to realize on these certificates of stock of this brick and lime company. I have not myself. I don't know anything about that.

Re-direct examination:

From my investigation and inquiries I know of no property of any of these persons, either in Idaho or elsewhere, to which I could have resorted for the payment of these overdrafts.

Re-cross examination:

By Mr. Whitcomb:

To my knowledge nothing more has been paid towards the overdraft of Fred Brough. The payment of \$27.19 was made before I took charge there, and nothing has been paid since.

Witness examines Exhibit A, attached to the bill of complaint, and states that the overdraft of E. E. Minart has been paid, \$2.45. I think, Mr. Whitcomb, that is the only overdraft that I can recall from memory that has been paid.

F. J. COWEN, called as witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is F. J. Cowen. I reside at Salmon, Idaho. I am Judge of the Sixth District Court. As an attorney, I think I represented the First National Bank of Salmon and Mr. McCormick in the case of Western Loan & Savings Company, a corporation, against Saphronia A. Pollard, Frank M. Pollard and the First National Bank of Salmon, a corporation, and Frank R. McCormick, as Receiver of the First National Bank of Salmon, in the District Court of the Sixth Judicial District of Idaho, in and for Lemhi County, and am reasonably familiar with the proceedings.

Plaintiff's Exhibit 24 was offered and received in evidence.

PLAINTIFF'S EXHIBIT NO. 24.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, and the FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of First National Bank of Salmon, *Defendants.*

COMPLAINT IN FORECLOSURE.

The plaintiff, the Western Loan and Savings Company, a corporation, complains of the above-named defendants and for cause of action alleges:

I.

The plaintiff is a loan and savings corporation, created, organized and existing under and by virtue of the laws of the State of Utah.

II.

That before the dates hereinafter mentioned plaintiff caused to be filed in the office of the County Recorder of the County of Bannock, in the State of Idaho, a duly certified copy of its articles of incorporation, and also before said dates caused to be filed in the office of the Secretary of State of the State of Idaho, a copy of said articles duly certified by the County Recorder of said County of Bannock.

III.

That before said dates and time hereinafter mentioned plaintiff accepted the provisions of the Constitution and laws of the State of Idaho, and caused to be filed in the office of the Clerk of the District Court of said County of Bannock a designation of agent and acceptance of the provisions of said Constitution and Statutes of said State of Idaho.

IV.

That on or about the day of March, 1911, at Salmon, in the County of Lemhi, State of Idaho, the defendants, Sophronia A. Pollard and Frank M. Pollard, made, executed and delivered to plaintiff, for value received, one certain promissory note or contract by which the said defendants promised to pay to said plaintiff the sum of Fifteen Hundred Dollars, with interest thereon at the rate of twelve

per cent per annum, principal and interest payable monthly as follows: Twenty-seven and no-100 Dollars on the 16th day of each and every month, commencing with the month of March, 1911, until eighty-one (81) payments shall have been made, payments to be applied first upon interest due, the balance upon principal. And by said promissory note defendants further promised to and with plaintiff that default in the payment of any installment shall and would mature the entire indebtedness. Defendants also, by said promissory note, promised to and with plaintiff, that if, after default, said note is placed in the hands of an attorney for collection, they would pay reasonable attorney's fee of such attorney.

V.

That said defendants, to secure the payment of said principal sum of money, and the interest thereon at maturity, as set forth in said promissory note, and according to the tenor and effect thereof, did, at the same time and place, execute, under their hands and seals, and deliver to plaintiff a certain mortgage bearing the date aforesaid, and conditioned for the payment of said sum of Fifteen Hundred Dollars, lawful money of the United States of America, and interest thereon at the rate of twelve per cent per annum, at the time and in the manner specified in said promissory note, by which mortgage said defendants sold and conveyed unto the plaintiff that certain piece or parcel of land, situate, lying and being in the County of Lemhi, State of Idaho, more particularly described as follows, to-wit: Lot Three (3),

Block Six (6), of the Re-subdivision of Tingley's Addition to North Salmon, as shown by Book 1 of Plats, at page 19, now on file in the office of the County Recorder of Lemhi County, Idaho, upon condition that said defendants would pay plaintiff the said promissory note of Fifteen Hundred Dollars and interest thereon at the rate of twelve per cent per annum, at the time and in the manner specified and set forth in the aforesaid promissory note. Which mortgage was duly recorded, acknowledged and certified to, entitled it to be recorded, and the same was afterwards, on the 4th day of March, 1911, recorded in the office of the County Recorder of said Lemhi County, Idaho, in Book "E" of Mortgages, at page 602.

Said mortgage is in words and figures following, to-wit:

"This Indenture, Made the day of , A. D. 1910, by and between Sophronia A. Pollard and Frank M. Pollard, her husband, of Salmon, County of Lemhi and State of Idaho, the parties of the first part, and the Western Loan and Savings Company, a corporation existing under the laws of the State of Utah, party of the second part.

"Witnesseth, That the said parties of the first part, for and in consideration of the sum of Fifteen Hundred Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do grant, bargain, sell, convey and confirm unto the said party of the second part, and to its

assigns and successors forever, all that certain piece or parcel of land situate, lying and being in the County of Lemhi, and State of Idaho, more particularly described as follows, to-wit: Lot Three (3), Block Six (6) of the Re-subdivision of Tingley's Addition to North Salmon, Book 1 of Plats, page 19.

"To have and to hold the same, together with all the tenements, hereditaments, privileges, appurtenances and water rights, including water rights represented by stock in companies, thereunto belonging or used therewith, and including all homestead and exemption rights therein.

"This conveyance is intended as a mortgage to secure the payment of one certain promissory note, made and executed by the said parties of the first part, in words and figures as follows, to-wit:

"\$1500.00. Salmon, Idaho, March 3, 1911.

"For value received, we promise to pay to the order of the Western Loan and Savings Company, a corporation, at its office in Salt Lake City, Utah, the sum of Fifteen Hundred Dollars, with interest thereon at the rate of twelve per cent per annum, principal and interest payable monthly, as follows: Twenty-seven and no-100ths Dollars on the 16th day of each and every month, commencing with the month of March, 1911, until Eighty-one (81) payments shall have been made, payments to be applied first upon interest due, the balance upon principal. Default in the payment of any installment shall mature the entire indebtedness, and if, after default, this note is placed in the hands of an attorney for col-

lection, we agree to pay the reasonable attorney's fee of such attorney.

"SOPHRONIA A. POLLARD.

"FRANK M. POLLARD.

"And the said parties of the first part hereby covenant and agree with the party of the second part, its assigns and successors, as follows:

"That the said parties of the first part are well seized of said premises in fee simple, that the same are free and clear from any and all incumbrances, and that they shall and do forever warrant the same against the lawful claims of all persons. To keep the buildings and improvements, situated or placed on said premises, insured against fire, in such company as may be approved by the party of the second part, to the amount of \$1500.00, with loss, if any, payable to the party of the second part, and deliver such policy as soon as issued to the party of the second part; to pay all taxes and assessments levied upon said premises, when same become due and payable, and file the receipts for the same with the said party of the second part; to pay the expenses of releasing this mortgage on the records when it shall have been fully paid; to pay the costs, including a reasonable attorney's fee, for enforcing the provisions of or foreclosing this mortgage; to repay immediately to the parties of the second part any and all sums paid by it for insurance or taxes, or for any other purpose to protect the security hereby given, with interest on such sums at the rate of twelve per cent per annum, and any and all such sums are here-

by included in the amount secured by this mortgage.

“In case of the failure of the parties of the first part to keep said premises insured as herein provided, or to deliver the insurance policy or any renewal or substitute policy for the same, to the party of the second part, the party of the second part shall have the right immediately upon any such failure to procure said insurance upon said premises, and any sum paid for such insurance, together with interest at twelve per cent per annum thereon, shall immediately fall due from the said first parties to the second party.

“The party of the second part shall in no event be responsible for the sufficiency in form or substance of the policy or the solvency or sufficiency of any insurance company in respect to the insurance herein provided for. Money collected by the party of the second part or any insurance policy may, at its option, be devoted to the repair or reproduction of the subject of the insurance, or applied and credited to the indebtedness hereby secured. The installments then remaining unpaid shall thereafter fall due, one each month, commencing in the month next succeeding the month of such application.

“And it is further agreed that, in case of default in the payment of said promissory note according to its terms, or in case of failure to procure or maintain the insurance as above mentioned, or pay the premiums therefor, or to pay the taxes assessed against said property; or in case of a breach of any of the

covenants or agreements herein contained, then all of said principal sum remaining unpaid shall at once mature and become payable, and the said party of the second part may at once foreclose this mortgage, and, in the manner prescribed by law, sell the said premises, with all and every the appurtenances or any part thereof, and out of the proceeds of said sale retain the amount due on said principal sum, with interest thereon at the rate of 12 per cent per annum, and retain also the costs and charges of making such foreclosure and sale, and a reasonable sum for attorney's fees, together with any and all sums paid by it for insurance or taxes, or for any other purpose to protect the security hereby given, with interest thereon, and the overplus, if any there be, shall be paid to said parties of the first part, their heirs and assigns.

"In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

"SOPHRONIA A. POLLARD.

"FRANK M. POLLARD.

"Signed, sealed and delivered in the presence of P. J. Dempsey."

UNITED STATES OF AMERICA.

State of Idaho,

County of Lemhi,—ss.

On this 3rd day of March, in the year 1911, before me, P. J. Dempsey, a notary public, personally appeared Sophronia A. Pollard and Frank M. Pollard, her husband, known to me to be the persons whose

names are subscribed to the within instrument, and acknowledged to me that they executed the same.

(Seal.) P. J. DEMPSEY, Notary Public.

VI.

That the plaintiff is now the lawful owner of said promissory note and mortgage.

VII.

That the defendants, Sophronia A. Pollard and Frank M. Pollard, have not paid said promissory note, nor any part thereof.

VIII.

That it was provided in said note and mortgage, as herein above stated, that in case default be made in the payments of any installment of said note and mortgage, the entire indebtedness created by the loan of said money and the note and mortgage would at once mature and become payable, although the time expressed in said note for each payment shall not have arrived, and the said party of the second part might at once foreclose this mortgage in the manner prescribed by law, sell the said premises with all and every appurtenances or any part thereof, and out of the proceeds of said sale retain the amount due on said principal sum, with interest thereon at the rate of 12 per cent per annum, and retain also the costs and charges of making such foreclosure and sale, and a reasonable sum for attorney's fees, together with any and all sums paid by it for insurance or taxes, or for any other purpose to protect the security hereby given, with interest thereon, and the

overplus, if any thereby, shall be paid to said parties of the first part, their heirs and assigns.

IX.

That under the terms of the aforesaid note and mortgage installments of Twenty-seven and no-100 Dollars each became due and payable on the 16th day of May, June, July, August, September, October, November and December, 1911, and the 16th day of January, February and March, 1912, which said installments or payments have not been made and are still due and unpaid, and the plaintiff elects to deem and consider the whole principal sum and interest of said note and mortgage to be immediately due and payable.

X.

That in and by the covenants and provisions of said mortgage the defendants, Sophronia A. Pollard and Frank M. Pollard, were required and they therein and thereby agreed with plaintiff, to pay all taxes and assessments levied upon said premises when the same became due and payable, and file receipts for the same with said plaintiff. That there was assessed and levied against said premises taxes for the year 1911, amounting to the sum of Fifty-five and 55-100 Dollars, which were due and payable December first of said last year named. That said defendants have not paid said amount of taxes, or any part thereof, and have not filed receipts for the same with the plaintiff. That because of said arrearage of taxes and by virtue of the right given to plaintiff by said mortgage, plaintiff paid said taxes to the proper of-

ficers of the County of Lemhi, to-wit, the sum of \$55.55, and now claim that the addition of that amount to the aforesaid mortgage debt, with interest at twelve per cent.

XI.

That, by virtue of the premises, there is now justly due to plaintiff on said note and mortgage the principal sum of fifteen hundred dollars, together with interest on said loan according to the terms of said note and mortgage to the amount of One Hundred Sixty-five (\$165.00) Dollars, making a total of principal and interest due to date of One Thousand Six Hundred Sixty-five (\$1665) Dollars.

XII.

That the sum of One Hundred Fifty Dollars is a reasonable counsel fee to be allowed to plaintiff in this action, and the plaintiff hereby asks for the allowance thereof by this Court.

XIII.

That all the covenants and conditions in said mortgage contained to be kept and performed by said defendants, Sophronia A. Pollard and Frank M. Pollard, have been broken.

XIV.

That the defendant, Frank M. Pollard, is the husband of the defendant, Sophronia A. Pollard, and has no interest in said mortgage and debt than as such husband.

XV.

That the defendant, the First National Bank of Salmon, a corporation, and Frank R. McCormick, as Receiver of First National Bank of Salmon, have, or claims to have, some interest or claim upon said above-described property, or some part thereof, as purchasers, mortgagees or otherwise, which interest or claim is subsequent to and subject to the lien of the plaintiff's mortgage.

Wherefore, Plaintiff prays judgment against the defendants:

1. For the sum of fifteen hundred dollars, with interest thereon from the 16th day of May, 1911, at the rate of twelve per cent per annum, and the sum of \$55.55 as and for the taxes on the above-described property, paid by plaintiff with interest thereon at the rate of twelve per cent per annum from and after the first day of January, 1912, and the sum of one hundred and fifty dollars as and for attorney's fees, and for the costs of this suit.

2. That the usual decree be made for the sale of said premises by the sheriff of the County of Lemhi, according to law and the practice of this Court; that the proceeds of said sale may be applied in payment of the amount due the plaintiff and that said defendants and all persons claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in said premises and every part thereof, and that said plaintiff may have judg-

ment and execution against the said defendant, Sophronia A. Pollard, for any deficiency which may remain after applying all the proceeds of the sale of said premises, properly applicable to the satisfaction of said judgment.

3. That the plaintiff, or any other party to the suit, may become a purchaser at said sale; that the sheriff execute a deed to the purchaser; that the purchaser be let into the possession of the premises on production of the sheriff's deed therefor; and that the plaintiff have such other and further relief in the premises as to this Court may seem meet and equitable.

JOHN H. PADGHAM,
GEO. W. PADGHAM,
Attorneys for Plaintiff,
Residence: Salmon, Idaho.

State of Idaho,
County of Lemhi,—ss.

Geo. W. Padgham, of said County, being first duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiff in this action.

2. I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

3. The reason this verification is not made by an officer of the plaintiff, is that there is now no officer

of said corporation within the County of Lemhi, which is the County wherein I reside.

GEO. W. PADGHAM.

Subscribed and sworn to before me this 20th day of March, 1912.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk of the District Court.

By W. W. SIMMONDS, Deputy.

No. 641: Filed March 20, 1912. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, and FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of First National Bank of Salmon, *Defendants.*

ANSWER.

Comes now the defendant, the First National Bank of Salmon, a corporation, and Frank R. McCormick, Receiver of the First National Bank of Salmon, and answers the complaint of the plaintiff on file herein, and for cause of answer admits, denies and alleges as follows:

I.

Answering paragraph seven of the plaintiff's complaint, this defendant denies that the defendants,

Sophronia A. Pollard and Frank M. Pollard, have not paid the promissory note alleged in the complaint, nor any part thereof, but, on the contrary, allege that they have paid and advanced to the plaintiff the sum of Two Hundred Eighty-seven Dollars and Fifty Cents which should be applied and credited on said note by the plaintiff.

Further answering the complaint, the defendant, the First National Bank of Salmon, and Frank R. McCormick, as Receiver of First National Bank of Salmon, alleges that it is informed and believes and therefore says:

I.

That the defendants, Sophronia A. Pollard and Frank M. Pollard, executed the note and mortgage alleged in plaintiff's complaint, and delivered the same to the plaintiff upon the express understanding, agreement and condition that if the said note and mortgage were accepted by the plaintiff the said plaintiff would, thereupon, loan and advance to the said Sophronia A. Pollard and Frank M. Pollard the sum of Fifteen Hundred Dollars.

II.

That the said plaintiff, upon receiving the said note and mortgage, accepted the same, but failed and refused to loan or advance to the said Sophronia A. Pollard and Frank M. Pollard the full sum of Fifteen Hundred Dollars, and that by reason thereof the said note and mortgage were given without consideration therefor.

And for further defense to the complaint of the plaintiff herein and by way of cross-complaint against the plaintiff and the defendants, Sophronia A. Pollard and Frank M. Pollard, and defendant alleges:

I.

That the defendant, the First National Bank of Salmon, is a national banking corporation, organized and existing under the laws of the United States, and as such has been at all times herein mentioned, doing a general banking business at Salmon, in the County of Lemhi, State of Idaho, until on or about the 8th day of June, 1911, when the said bank suspended payment, and that afterwards, on or about the 8th day of August, 1911, the Honorable Comptroller of the Currency of the United States determined the said bank to be in an insolvent condition and appointed a Receiver therefor; and that the defendant, Frank R. McCormick, is now the duly qualified and acting Receiver of said corporation.

II.

That on or about the 11th day of July, 1910, the defendants, Sophronia A. Pollard and Frank M. Pollard, executed and delivered to this defendant their certain promissory note, wherein they promised and agreed to pay to the said First National Bank of Salmon, or order, the sum of Seventeen Hundred Dollars on demand, after date, with interest thereon at the rate of ten per cent per annum; and that on or about the 29th day of June, 1910, the defendants, Sophronia A. Pollard and Frank M. Pollard, executed

and delivered to this defendant another certain promissory note, wherein they promised and agreed to pay to the said First National Bank of Salmon the sum of Six Thousand Two Hundred and Fifty Dollars four months after date, with interest thereon at the rate of ten per cent per annum.

III.

That the defendants, Frank M. Pollard and Mrs. Sophronia A. Pollard, his wife, to secure the payment of the said promissory notes, on or about the first day of July, 1911, executed and delivered to the said First National Bank a certain mortgage wherein they sold and conveyed to this defendant certain real estate described therein, which mortgage was duly acknowledged and certified so as to entitle it to be of record, and the same was, on the 6th day of July, 1911, duly recorded in the office of the County Recorder of the said County of Lemhi, Idaho, in Book "G" of Mortgages, at page 81, a copy of which said mortgage, marked Exhibit "A," is attached to this complaint and is hereby made a part thereof.

IV.

That this defendant and cross-complainant is now the lawful owner and holder of the said promissory notes and mortgage.

V.

That the defendants, Frank M. Pollard and Sophronia A. Pollard, have not paid the said promissory notes, nor any part of either of them, and the same are now due.

VI.

That the sum of Seven Hundred and Fifty Dollars is a reasonable counsel fee to be allowed to this cross-complainant as an attorney fee for the foreclosure of said mortgage.

Wherefore, this defendant prays the judgment and decree of this Court.

I.

That the complaint of the plaintiff herein be dismissed and that plaintiff take nothing thereby.

II.

That the defendant, the First National Bank, by Frank R. McCormick, Receiver therefor, have and recover judgment against the co-defendants, Frank M. Pollard and Sophronia A. Pollard, his wife, for the sum of Seventeen Hundred Dollars, with interest thereon from the 11th day of July, 1910, and for the further sum of Six Thousand Two Hundred and Fifty Dollars, with interest thereon from the 29th day of June, 1910, both at the rate of ten per cent per annum, and for costs of suit, including Seven Hundred and Fifty Dollars as attorney fees.

III.

That the usual decree be made for the sale of the premises described in the mortgage so given by the defendants, Frank M. Pollard and Sophronia A. Pollard, to the said First National Bank of Salmon; that the proceeds of said sale may be applied in payment of the amount so due to the First National Bank, and that the defendants, Frank M. Pollard and Sophronia

A. Pollard, and all persons claiming under them, subsequent to the execution of said mortgage, may be barred and foreclosed of all right, claim or equity of redemption in said premises and every part thereof, and that the said First National Bank may have judgment and execution against the said defendants, Frank M. Pollard and Sophronia A. Pollard, for any deficiency which may remain after applying all the proceeds of the sale of said premises, properly applicable to the satisfaction of the said judgment.

IV.

That the said First National Bank, by Frank R. McCormick, Receiver therefor, or any other party to the suit may become a purchaser at said sale; that the Sheriff execute a deed to the purchaser; that the purchaser be let into the possession upon production of said deed, and that this cross-complainant have such other relief of the said premises as to this Court may seem just and equitable.

F. J. COWEN,

Residence: Salmon, Idaho,

Attorney for First National Bank.

State of Idaho,

County of Lemhi,—ss.

Frank R. McCormick, being first duly sworn, deposes and says: That he is one of the defendants named in the said action; that he has read the foregoing answer and cross-complaint of the defendant, the First National Bank, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be

on information or belief and as to those matters he believes the same to be true.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 3rd day of April, 1912.

(Seal.)

J. P. NIXON, JR.,

Notary Public in and for Lemhi County, Idaho.

My commission expires May 6, 1914.

Service of the foregoing answer and cross-complaint is hereby admitted by receipt of a copy thereof this 3rd day of May, 1912.

GEO. W. PADGHAM,

JOHN H. PADGHAM,

Attorneys for Plaintiff.

E. W. WHITCOMB,

Attorney for Defendants,

Frank M. and S. A. Pollard.

This Indenture, Made the 27th day of June, in the year of our Lord one thousand nine hundred and eleven, between Francis M. Pollard and Sophronia A. Pollard, his wife, and Sophronia A. Pollard, in her own right of property, of the County of Lemhi, State of Idaho, the parties of the first part, and the First National Bank of Salmon, County of Lemhi, State of Idaho, the party of the second part;

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Seven Thousand Nine Hundred and Fifty (\$7,950.00) Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second

part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said party of the second part and to its successors and assigns forever, all those certain lost pieces or parcels of land, situated, lying and being in the County of Lemhi, and State of Idaho, and particularly described as follows, to-wit:

All of lot number Three (3) and all of lot number Four (4) of and in Block number Six (6) of and in re-subdivision of Tingley's Addition to North Salmon, as the aforesaid lot appears upon that certain plat now on file and of record in the office of the County Recorder of Lemhi County, Idaho, in Book One of Plats, at page 19, Official Records of said Lemhi County.

Together with all buildings, ditches and water rights and all improvements erected or situated thereon, belonging or appertaining thereto or used in connection therewith, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

This grant is intended as a mortgage to secure the payment of two certain promissory notes executed and delivered by the said parties of the first part to the said party of the second part, which notes are in words and figures following, to-wit:

No. 2459.

Salmon, Idaho, July 11th, 1910.

On demand, after date, for value received, and without grace, I, we or either of us, promise to pay to the order of the First National Bank of Salmon,

Seventeen Hundred (\$1700.00) Dollars, in lawful money of the United States of America, at the First National Bank, Salmon, Idaho, with interest thereon in like money, from date until paid, at the rate of ten per cent per annum, interest to be paid. and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted, to collect this note or any portion thereof, we promise to pay, besides costs and disbursements, as attorney's fees in said suit or action.

(Signed:) MRS. S. A. POLLARD.

(Signed:) F. M. POLLARD.

Due. 190. . .

P. O.

No. Salmon, Idaho, June 29, 1910.

Four months after date, for value received, and without grace, I, we or either of us, promise to pay to the order of the First National Bank of Salmon, Six Thousand Two Hundred Fifty (\$6,250.00) Dollars, in lawful money of the United States of America, at the First National Bank, Salmon, Idaho, with interest in like money, from date until paid, at the rate of ten per cent per annum, interest to be paid. and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides

costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

(Signed:) MRS. S. A. POLLARD.

(Signed:) F. M. POLLARD.

Due.....190...

P. O.

All these presents shall be void if such payments be made, but in case default shall be made in the payment of the said principal sum of money, or any part thereof, as provided in said notes, or if the interest be not paid as herein specified, then and from thenceforth it shall be optional with the said party of the second part, its successors or assigns, to consider the whole of said principal sum expressed in said notes as immediately due and payable, although the time expressed in said notes for the payment thereof shall not have arrived, and immediately to enter into and upon all and singular the above-described premises, and to sell and dispose of the same and all benefit and equity and redemption of the said parties of the first part, their heirs, executors, administrators or assigns, according to law, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory notes, together with the costs and charges of foreclosure suit, including reasonable counsel fees, and also the amounts of all such payments, of taxes, assessments, incumbrances or insurance as may have been made by said party of the second part, its heirs, executors, administrators or assigns, by reason of

the permission hereinafter given, with the interest on the same hereinafter allowed, rendering the overplus of the purchase money (if any there shall be) unto the said parties of the first part, their heirs, executors, administrators, or assigns. And the said parties of the first part do hereby further covenant, promise and agree to and with the said party of the second part, to pay and discharge, at maturity, all such taxes or assessments, liens or other incumbrances now subsisting or hereafter to be laid or imposed upon said premises, or which may be in effect a prior charge thereupon to these presents, during the continuance thereof, and in default thereof the said party of the second part may pay and discharge the same, and may, at his option, keep fully insured against all risks by fire the buildings which are now or may be hereafter erected thereon, at the expense of the said parties of the first part, and the same so paid shall bear interest at the rate of ten per cent per annum until paid, and shall be considered as secured by these presents and be a lien upon said premises, and shall be deducted from the proceeds of the sale thereof, above mentioned, with interest as provided.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Seal.) FRANCIS M. POLLARD.

(Seal.) SOPHRONIA A. POLLARD.

Signed, sealed and delivered in the presence of
John C. Sinclair.

State of Idaho,
County of Lemhi,—ss.

On this first day of July, 1911, before me, John C. Sinclair, a Notary Public in and for said County, personally appeared Francis M. Pollard and Sophronia A. Pollard, his wife, known to me to be the persons whose names are signed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

JOHN C. SINCLAIR,
Notary Public in and for Lemhi County, Idaho.

State of Idaho,
County of Lemhi,—ss.

I hereby certify that this instrument was filed for record at request of the First National Bank, in liquidation, 5 minutes past 10 o'clock A. M., this 6th day of July, A. D. 1911, in my office, and duly recorded in Book "G" of Mortgages, at page 81.

J. L. KIRTLEY, JR.,
Ex-officio Recorder.

By W. W. SIMMONDS, Deputy.

Filed: No. 641. May 4, 1912. J. L. Kirtley, Jr.,
Clerk. By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN & SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, the FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of the First National Bank of Salmon, *Defendants.*

ANSWER.

Come now the defendants, Sophronia A. Pollard and Frank M. Pollard, and answer the complaint of the plaintiff on file herein, and for cause of answer admit, deny and allege as follows:

I.

Answering paragraph seven of the plaintiff's complaint, the defendants deny that they have not paid the said promissory note, or any part thereof, but on the contrary, allege that they have paid and advanced to the plaintiff the sum of \$, which should be applied and credited on said note by plaintiff.

II.

That the said defendants, Sophronia A. Pollard and Frank M. Pollard, executed the note and mortgage alleged in plaintiff's complaint and delivered the same to the plaintiff upon the express understanding, agreement and condition that if the said note and mortgage were accepted by the plaintiff,

the plaintiff would thereupon loan and advance to the said defendants the sum of Fifteen Hundred (\$1500.00) Dollars.

III.

That the said plaintiff, upon receiving the said note and mortgage, accepted the same, but failed and refused to loan or advance to the said defendants the said sum of Fifteen Hundred (\$1500.00) Dollars, or any part thereof, and that by reason thereof the said note and mortgage were given without due consideration therefor.

Wherefore, The plaintiff prays the judgment and decree of this Court.

I.

That the complaint of the plaintiff herein be dismissed, and the plaintiff take nothing thereby.

II.

That the said defendants, Sophronia A. Pollard and Frank M. Pollard, be given such other and further relief as to this Court may seem just and equitable.

E. W. WHITCOMB,

*Attorney for Defendants, Sophronia A. Pollard
and Frank M. Pollard,*

Residence: Salmon, Idaho.

State of Idaho,
County of Lemhi,—ss.

Frank M. Pollard, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing ans-

wer and knows the contents thereof, and that the same is true of his own knowledge.

FRANK M. POLLARD.

Subscribed and sworn to before me this 30th day of April, A. D. 1912.

(Seal.)

ENOCH W. WHITCOMB,

Notary Public.

Service of the above is acknowledged by receipt of a copy of the same this 6th day of May, 1912.

GEO. W. PADGHAM,

F. J. COWEN,

Attorneys for McCormick and Bank.

Filed July 3, 1912. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, and the FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of First National Bank of Salmon, *Defendants.*

ANSWER TO DEFENDANT'S CROSS-COMPLAINT.

Comes now the plaintiff, the Western Loan and Savings Company, a corporation, and answers the cross-complaint of defendants, the First National

Bank of Salmon, a corporation, and Frank R. McCormick as Receiver of First National Bank of Salmon, on file herein, and for answer admits, denies and alleges as follows:

I.

Admits that the defendants, Sophronia A. Pollard and Frank M. Pollard, did, on or about the 11th day of July, 1910, execute their certain promissory note wherein they promised and agreed to pay to the said First National Bank of Salmon, or order, the sum of Seventeen Hundred Dollars, on demand after date, and that on or about the 29th day of June, 1910, Sophronia A. Pollard and Frank M. Pollard, defendants, executed and delivered to the said bank another certain promissory note wherein they promised and agreed to pay to said First National Bank of Salmon the sum of Six Thousand Two Hundred and Fifty Dollars four months after date, with interest on both notes at the rate of ten per cent per annum.

II.

That the defendants, Sophronia A. Pollard and Frank M. Pollard, to secure the payment of said promissory notes, on or about the first day of July, 1911, executed and delivered to said First National Bank a certain mortgage wherein they sold and conveyed to this defendant bank certain real estate described therein and as set forth in answer of defendant, cross-complainant, all of which was duly acknowledged and certified and recorded as set forth in said answer.

III.

Denies that said claim of the defendant and cross-complainant is superior and should take precedence to the claim of plaintiff as in the complaint set forth in this action; but, on the contrary, alleges that said claim and right of defendant and cross-complainant, the First National Bank of Salmon, and Frank R. McCormick, as Receiver of First National Bank of Salmon, is inferior in right and subsequent in time to all claims of the plaintiff as set forth in its complaint herein.

Wherefore, Plaintiff prays the judgment and decree of this court:

I.

That the mortgage and notes as set forth in plaintiff's complaint be foreclosed and that the claims as therein set forth be fully allowed; that the mortgage and notes of defendants and cross-complainants, the First National Bank of Salmon and Frank R. McCormick as Receiver of First National Bank of Salmon, be declared inferior in right and subsequent in time to all claims of the plaintiff as set forth in its complaint herein; and that plaintiff be granted such other and further relief in the premises as this Court may seem just and equitable.

JOHN H. PADGHAM,
GEO. W. PADGHAM,
Attorneys for Plaintiff,
Residence: Salmon, Idaho.

State of Idaho,
County of Lemhi,—ss.

P. W. MADSEN, being first duly sworn according to law, deposes and says as follows:

1. I am the President of the plaintiff corporation in this action.

2. I have read the foregoing answer and know the contents thereof, and that it is true to my own knowledge, except as to those matters therein stated, on information and belief and as to those matters I believe it to be true.

P. W. MADSEN.

Subscribed and sworn to before me this 20th day of June, 1912.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk of the District Court.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, and the FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of First National Bank of Salmon, *Defendants.*

DEMURRER.

Come now the defendants, the First National Bank of Salmon, a corporation, and Frank R. McCormick, as Receiver of the First National Bank of

Salmon, and demur to the complaint of the plaintiff, on file in the above-entitled action, and for cause of demurrer allege:

That the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, These defendants pray to be hence dismissed with their costs herein incurred.

F. J. COWEN,

Residence: Salmon, Idaho.

*Attorney for First National Bank of Salmon
and Frank R. McCormick as Receiver.*

Service of the foregoing demurrer is hereby admitted by a receipt of a copy thereof this 1st day of April, 1912.

GEO. W. PADGHAM.

Filed April 3, 1912. J. L. Kirtley, Jr., Clerk.

*In the District Court of the Sixth Judicial District
of Idaho, in and for the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, the FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of First National Bank of Salmon, *Defendants.*

DEMURRER.

The defendants, Sophronia A. Pollard and Frank M. Pollard demur to the plaintiff's complaint herein, and for cause of demurrer allege that said complaint

does not state facts sufficient to constitute a cause of action.

Wherefore, Defendants pray that plaintiff's complaint may be dismissed, and that defendants be allowed their costs.

E. W. WHITCOMB,
Attorney for Sophronia A. Pollard and Frank M. Pollard.

Received a copy of the above this eleventh day of April, A. D. 1912.

JOHN H. PADGHAM,
GEO. W. PADGHAM,
Attorneys for Plaintiff.

Filed April 11, 1912. J. L. Kirtley, Jr., Clerk.
By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY, a
Corporation, *Plaintiff,*

vs.

SOPHRONIA A. POLLARD, FRANK M. POLLARD, and the FIRST NATIONAL BANK OF SALMON, a Corporation, and FRANK R. McCORMICK, as Receiver of First National Bank of Salmon, *Defendants.*

DECREE OF FORECLOSURE.

This cause coming on for trial in the April term of this Court and having been tried before the Court on the 21st day of June, 1912, John H. Padgham,

James Ingebretsen and Geo. W. Padgham, as attorneys appearing for the plaintiff, and E. W. Whitcomb, attorney of this Court, appearing for defendants, Sophronia A. Pollard and Frank M. Pollard, and F. J. Cowen, attorney for this Court, appearing for the defendants, the First National Bank of Salmon, and Frank R. McCormick, as Receiver of the First National Bank of Salmon; and, after hearing the allegations and proofs of the parties, the arguments of the counsel, and having been advised in the premises, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

It appearing to the satisfaction of the Court that there is now due and owing the plaintiff, the Western Loan and Savings Company, by the defendants, Sophronia A. Pollard and Frank M. Pollard, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint of said plaintiff, the sum of Sixteen Hundred Ninety-five Dollars, which sum is due and to bear interest at the rate of seven per cent per annum, from this date, besides the sum of Fifty-five and 55-100 Dollars for taxes paid by plaintiff, and the further sum of One Hundred Fifty Dollars, allowed by the Court and adjudged a reasonable sum to be allowed as attorney's fee to the plaintiff in this action, together with costs hereof taxed in the sum of Twenty-three Dollars, that a notice of pendency of action in due form

was filed in the office of the County Recorder of Lemhi County on the 14th day of November, 1912, and that all of the allegations of plaintiff's said complaint are true; now on motion of counsel for plaintiff,

It is Adjudged and Decreed, That all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff, the Western Loan and Savings Company, for the debt aforesaid and costs of this suit and expenses of sale, be sold at public auction by the sheriff of the County of Lemhi in the manner prescribed by law, and according to the course and practice of this Court, and that the said Sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale.

That the said Sheriff, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale and pay to the plaintiff out of said proceeds the sum of Nineteen Hundred Twenty-three and Fifty-five Hundredths Dollars, the amount so found due as aforesaid, including costs, together with interest thereon, at the rate of seven per cent per annum, from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

That the said Sophronia A. Pollard and Frank M. Pollard and all persons claiming or to claim from or under them, or either of them, and all persons having liens, subsequent to said mortgage, by judgment or

decree upon the land described in said mortgage, and their or its personal representative, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action, with the Recorder as aforesaid, be forever barred and foreclosed of and from all equity or redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of said Sheriff's deed.

And It is Further Adjudged and Decreed, That the purchaser and purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties of this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the Sheriff's deed for such premises.

And It is Further Adjudged and Decreed, That, if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with interest and costs and expenses of sale as aforesaid, the Sheriff specify the amount of such deficiency and balance due to the plaintiff in his return of said sale, and that, on the coming in and filing of said return, the Clerk of this Court docket a judgment for such balance against

the defendants, Sophronia A. Pollard and Frank M. Pollard, and that the said defendants pay to the said plaintiff, the Western Loan and Savings Company, the amount of such deficiency and judgment, with interest thereon, at the rate of seven per cent per annum, from the date of said last mentioned return and judgment, and that the plaintiff, the Western Loan and Savings Company, have execution therefor.

The lands and premises directed to be sold by this decree are situate, lying and being the County of Lemhi, State of Idaho, and bounded and particularly described as follows: Lot Three (3), Block Six (6) of the Re-subdivision of Tingley's Addition to North Salmon, Book 1 of Plats, at page 19, all of record in the office of the County Recorder of said Lemhi County, Idaho. Said premises being now within the corporate limits of the City of Salmon, Lemhi County, Idaho.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

It further appearing to the satisfaction of the Court that there is now owing to the cross-complainant, the First National Bank of Salmon, by the defendants, Sophronia A. Pollard and Frank M. Pollard, for the principal and interest upon the debts and mortgage mentioned and set forth in cross-complaint of said First National Bank of Salmon the sum of \$9517.05, besides the sum of \$750.00 allowed by the Court and adjudged reasonable as attorney's

fee for the foreclosure of said mortgage, together with its costs of suit taxed in the sum of \$3.00.

And it further appearing to the Court that the said First National Bank of Salmon has a second mortgage upon the lands and premises described in the plaintiff's mortgage, and that, in addition thereto, as security for the debts so alleged to be due to the said First National Bank from the defendants, Sophronia A. Pollard and Frank M. Pollard, they executed and delivered to the said First National Bank their said mortgage wherein they mortgaged to the said First National Bank the lands and premises so before mortgaged to the plaintiff, and in addition thereto they mortgaged Lot number Four of and in Block number Six of and in the Re-subdivision of Tingley's Addition to North Salmon, as the aforesaid lot appears on that certain plat now on file and of record in the office of the County Recorder of Lemhi County, Idaho, in Book One of Plats, at page 19, of the official records of said Lemhi County; together with all buildings, ditches and water rights and all improvements erected or situated thereon, belonging or appertaining thereto, or used in connection therewith, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

Now, in consideration of the premises, it is further adjudged and decreed as follows:

That the Sheriff of Lemhi County be and he is hereby required to pay to the said First National Bank of Salmon the surplus money obtained at the

sale of the said premises so mortgaged to the plaintiff, after paying to the plaintiff the amounts heretofore ordered and directed to be paid to it, or so much of the said surplus as may be necessary to satisfy the debts and costs herein found to be due to the said First National Bank of Salmon from the said defendants, Sophronia A. Pollard and Frank M. Pollard, under the terms of said second mortgage.

That the Sheriff shall proceed to sell the said Lot number Four, above described, in like manner and form as the said Lot number Three, and out of the proceeds arising from said sale, retain his fees and disbursements on said sale, and pay to the plaintiff and his attorney, of the said proceeds, the sum of \$3.00 costs of this suit, also the further sum of \$750 attorney's fees, and the sum of \$9517.05, the amount so found due, as aforesaid, together with interest thereon at the rate of seven per cent per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

It is further adjudged and decreed that, if the moneys arising from said sales shall be insufficient to pay the amount so found due to the said First National Bank as above stated, with interest and costs and expenses of sale as aforesaid, the said Sheriff shall certify the amount of such deficiency and balance due to the said First National Bank of Salmon in his return, to said sale, and that on the coming in and filing of the said return, the Clerk of this Court shall docket a judgment for such balance against the defendants, Sophronia A. Pollard and Frank M. Pol-

lard and in favor of the First National Bank of Salmon the amount of such deficiency and judgment, with interest thereon at the rate of seven per cent per annum from the date of said last mentioned return and judgment, and that the said First National Bank of Salmon have execution therefor.

That said Sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale. In all other respects the provisions herein relative to sale of said premises by the plaintiff are to control.

The plaintiff and cross-complainant are hereby authorized and given the right to bid at the sale of said premises.

Done in open Court this 21st day of June, 1912.

J. M. STEVENS, Judge.

Filed January 6, 1913. J. L. Kirtley, Jr., Clerk.
By W. W. Simmonds, Deputy.

*In the District Court of the Sixth Judicial District
of the State of Idaho, in and for
the County of Lemhi.*

WESTERN LOAN AND SAVINGS COMPANY,
Plaintiff,

VS.

SOPHRONIA A. POLLARD, et al., *Defendants.*

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the judgment entered in the above en-

titled action, and recorded in Judgment Book B of said Court, pages 94 and 95. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action.

Witness my hand and the seal of said Court this 11th day of March, A. D. 1913.

(Seal.)

J. L. KIRTLEY, JR., Clerk.

By W. W. SIMMONDS, Deputy.

Judgment Roll, Number 641. Filed March 11th, 1913. J. L. Kirtley, Jr., Clerk. By W. W. Simmonds, Deputy.

State of Idaho,

County of Lemhi,—ss.

I, the undersigned, Clerk of the District Court of the Sixth Judicial District of the said State, in and for said County, do hereby certify that the foregoing is a true copy of the judgment entered into the above entitled action, and recorded in Judgment Book B of said Court, pages 94 and 95. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action. And I still further certify that on the coming in of the Sheriff's return on an order of sale in the above entitled action, to-wit, on the 8th day of March, 1913, that a deficiency judgment was docketed in favor of the First National Bank, the cross-complainant herein, and against the defendants, Sophronia A. Pollard and Frank M. Pollard, in the sum of Ten Thousand Six Hundred Thirty-one and 71-100 (\$10,631.71) Dollars, and that no satisfaction or partial satisfaction has ever been entered.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 20th day of February, 1915.

J. L. KIRTLEY, JR.,

(Seal.)

Clerk of the District Court.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

Mr. Richards: Is this just the complaint?

Mr. Budge: No—it is the judgment roll.

Mr. Richards: As I take it, you are offering this to show that suit was brought against the Pollards, and the failure to collect?

Mr. Budge: Yes.

Mr. Richards: But you allege here a loan in March, 1911.

Mr. Budge: You are reading, I think, from the complaint of the Western Loan & Savings Company. There is a cross-complaint of the bank. They brought the suit, and the bank came in by way of cross-complaint.

Q. Do you recall, Mr. Cowen, the sale which took place under the decree of foreclosure in this case?

A. I do. I couldn't give the date of it from memory, Mr. Budge, only approximately, but I recall the sale. I know the amount that was realized above the claim of the Western Loan & Savings Company at this sale which was applied upon the indebtedness of the bank. The amount was \$150.00. That was the total amount. In a great many matters since the bringing of said action, and since the sale took place, I have, prior to my election as judge, represented the

Receiver, Mr. McCormick. I am familiar with the Salmon Lumber Company. I am trustee of said company's property. The papers concerning my appointment as trustee are dated March 25, 1912, about nine or ten months after the closing of the bank. (Said papers were marked Plaintiff's Exhibits 25 and 26.) I will explain, the papers are identical in form, I think, but signed by different parties. (Said exhibits were offered and received in evidence.)

PLAINTIFF'S EXHIBIT NO. 25.

Know All Men by These Presents: That the Salmon Lumber Company, Limited, a corporation organized and existing under the laws of the State of Idaho, acting by and through the undersigned, D. C. Slaughter, C. K. Slaughter, Ada Slaughter, A. K. Carl and J. N. C. Lottridge, holders and owners of all the issued capital stock of the said corporation, and constituting the entire Board of Directors of the said corporation, does hereby make, constitute and appoint F. J. Cowen, of Salmon City, County of Lemhi, State of Idaho, its true and lawful agent, attorney-in-fact and trustee, irrevocable, for it and in its name, place and stead, to manage and conduct all the business of the said corporation; to sell, assign, transfer, set over and otherwise dispose of all of the lumber, material, goods, wares and merchandise and other personal property belonging to the said corporation, either in bulk or otherwise, and for such price and upon such terms and conditions as the said attorney may deem best; to ask, demand, sue for, collect and receive, either in the name of the

said corporation, or in his own name, all such sums of money, debts, rents, dues, accounts and other demands, whatsoever, which are or shall be due, payable or belonging to or detained from said corporation, in any manner, whatsoever, and to compound, compromise or settle any such debts, claims or demands for such sums and in such manner as the said attorney may deem just; hereby authorizing and empowering its said attorney or agent to do and perform any act or thing necessary or expedient to be done in or about the premises to carry out the terms and conditions of this authority and trust hereinafter directed.

But this power and authority are granted upon the express condition, and the said attorney and agent is hereby authorized and directed to close up the business of the said corporation and dispose of its said property at the earliest practicable moment, considering the best interest of the said company and its creditors; and he is further directed and authorized to apply the proceeds derived from the disposal of its said property, after paying the necessary costs and expenses incidental thereto, to the payment of the bills, notes, accounts and other obligations of the said corporation in equal and proportionate shares until the whole thereof shall be satisfied and discharged, rendering any overplus to the undersigned in ratio of their ownership of the shares of the said company.

And for the purpose of carrying out the terms of this power and trust, the undersigned do hereby,

each for himself and herself, sell, assign, transfer and set over to the said F. J. Cowen, all of the shares and certificates of the stock of the said corporation, owned by himself or herself, and standing on the books of the said corporation, in their names or otherwise, to the end that the said F. J. Cowen may sell or dispose of the same, or may transfer the said stock for the purpose of perpetuating said corporation or dissolving the same or otherwise.

Giving and granting unto the said agent, attorney and trustee full power and authority to do and perform all and every act and thing, whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as the said corporation might or could do by action of its said Board of Directors or by the authority of its said stockholders, with full power of substitution and revocation, hereby ratifying and affirming all that its said attorney, his substitute and substitutes, shall do or cause to be done by virtue of these presents.

In Witness Whereof, the said parties have hereunto caused the name of the said corporation to be affixed and have set their personal hands, this 25th day of March, 1912.

C. D. SLAUGHTER.

C. K. SLAUGHTER.

ADA D. SLAUGHTER.

J. N. C. LOTTRIDGE.

State of Idaho,

County of Lemhi,—ss.

On this 25th day of March, 1912, before me, J. P. Nixon, Jr., a notary public in and for the said county

of Lemhi, State of Idaho, personally appeared C. D. Slaughter and C. K. Slaughter, personally known to me to be the persons whose names are subscribed to the foregoing instrument, and they each acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal.)

J. P. NIXON, JR.,

Notary Public in and for Lemhi County, Idaho.

My commission expires May 6, 1914.

State of Idaho,

County of Lemhi,—ss.

On this.....day of....., 1912,
before me,
a.....in and for the said
County of Lemhi, State of Idaho, personally appeared A. K. Carl, personally known to me to be the person whose name is subscribed to the foregoing instrument, and she acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.....
State of Idaho,

County of Ada,—ss.

On this 29th day of March, 1912, before me, John Driscoll, a Notary Public in and for the said County of Ada, State of Idaho, personally appeared Ada D. Slaughter, personally known to me to be the person

whose name is subscribed to the foregoing instrument and she acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal.) JOHN DRISCOLL,
*Notary Public in and for the County of Ada,
State of Idaho.*

State of California,
County of San Mateo,—ss.

On this 3rd day of April, 1912, before me, E. S. Moulton, a Notary Public in and for the said County of San Mateo, State of California, personally appeared J. N. C. Lottridge, personally known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal.) E. S. MOULTON,
*Notary Public in and for the County of San
Mateo, State of California.*

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

They are identical; I think one is in fact a carbon of the other. I didn't have charge of the company's property as such trustee prior to the execution of these papers. Perhaps there might have been two or three days, something like that, Mr. Budge, while

the papers were being prepared and forwarded to the parties. The assets of the Salmon Lumber Company, at the time of my appointment as trustee, consisted of a stock of lumber, and a lumber office and store building and some sheds situated on leased ground, and some unpaid accounts, perhaps two or three notes, was all that ever came into my possession. The inventory that was taken about the time that I took charge, speaking from memory, showed a value of the assets, the lumber and buildings and so forth, of between \$10,000.00 and \$10,500.00, as I recall it. I am unable to give the amount of the notes and bills receivable but approximately was in the neighborhood of three or four thousand dollars. The property has been disposed of, that is, a contract of sale has been made. The title hasn't entirely passed. It was sold to M. W. Freedorf, of Leadore. I think I had better make a short explanation with reference to that. We took another inventory at the time the sale was made, in November, I believe, of 1912, which showed between nine thousand and nine thousand five hundred dollars in value, other than the accounts and the notes. The buildings were situated on leased ground and when I had a chance to sell the property the party objected to taking it over without any title or any chance to stay there, in case the party owning the ground wanted him to move off, so I made arrangements to sell the property for approximately the invoice value and purchased the lot on which the buildings stood, and turned that in at about the invoice price, and paid \$1500.00 for the

ground. The net amount realized from the sale of these assets, taking into consideration the fact that I purchased the lot, was \$7600.00. Some of the notes and accounts outstanding have been collected. Perhaps some of them are collectible as yet, and some are not collectible.

Q. Are you able, from your familiarity with the affairs of the company, and its asseets, to state what amount will be paid to creditors, what percentage of their claims?

A. I cannot state it exactly. I can state an amount, a percentage beyond which the company will not be able to pay.

Q. And would the percentage which you are able to fix in that manner, would you be certain that it would not exceed that percentage?

A. Yes, sir. I can't fix the amount that can be paid, because I can't state how much I will be able to collect, but if everything is collected which is collectible, the company will not be able to pay in excess of 50 per cent of the obligations that it had when it came into my hands. I know of a claim that was owing by the Salmon Lumber Company to the First National Bank. I am not familiar with the amounts that have been paid, except the amount that I have paid the bank on account of this matter, and so I couldn't say whether Mr. Biscoe's testimony is correct as to the balance due on it or not, except in one particular, which I think he omitted to take into consideration, and that is a credit of \$1204.00, which is in a peculiar situation. The Salmon Lumber Com-

pany furnished some lumber to Lemhi County for a Mr. Stone, of Leadore, and the amount, as I understand, was owing or should have been paid to Mr. Stone, but the warrants were drawn in favor of the Salmon Lumber Company in that amount, and were collected by the bank, and, as I understand, credited on the amount due the Lumber Company. Mr. Stone was also owing the bank a note of some \$2000.00 at that time, and it is our understanding that that amount should have been credited to Stone's account. We brought suit against Mr. Stone, and that credit was allowed in the action, so that it reduced his indebtedness to the bank by \$1204.00, but created an obligation on the part of the Lumber Company to repay the bank the \$1204.00.

Q. Now, when you say that 50 per cent is as much as you will be able to pay, do you mean 50 per cent in all, including what you have paid?

A. Yes, including what I have paid. It will not be able to pay more than 50 per cent, including what has been paid to the bank. I have paid to the bank \$1500.00, according to my recollection. Mr. McCormick can correct me if that is not right. I know of no other payments made to the bank on the lumber company's account. I don't think there would be any payments other than those made by myself, but that is a mere matter of opinion. No one else would be authorized to make any payment other than myself that I know of, so that, on the total claim of the bank against the Salmon Lumber Company, as represented by the various notes that were introduced

in evidence, no other payment was made that I know of, except \$1500.00.

Mr. Richards: Do you intend to show that any payments were made between the time of the failure of the bank and the time Mr. Cowen took charge?

Mr. Budge: I shall do that, yes.

Cross-examination by Mr. Richards:

I received from the inventory of the lumber, as shown by the inventory, somewhere between \$10,000 and \$10,500. The inventories have passed from my hands, and I haven't them all, and my recollection is that I also received three or four thousand dollars in bills and accounts receivable. The teams and wagons were all included in the inventory. I purchased the ground on which the lumber rested for \$1500.00 and paid that out of the selling price of the lumber.

Q. Why did you take a second inventory, which you say was about \$9500.00?

A. After I took charge of the property, it was in an exposed condition, and I didn't think it advisable to leave it there without somebody to look after it, and if I had somebody looking after it he might just as well be selling from the stock when opportunity offered, and in that way the stock was lessened during the period when I took charge, and when I sold to Mr. Freedorf, and in order to ascertain the amount, or to arrive at a basis to deal with Mr. Freedorf, we had to take another inventory. I don't think the lumber company will be able to pay 50 per cent, Judge Richards, but it won't exceed that amount. The sale price of \$7600.00 was the very best I could

do. In fact, it was the only opportunity I had to sell.

Cross-examination by Mr. Whitcomb:

Through an agent, not by myself, I made considerable minor sales about the town before the sale to Mr. Freedorf. The \$7600.00 was the net amount received on the sale to Mr. Freedorf. The expense of keeping the place running about ate up what the sales amounted to, and I could see that if I continued to pursue that method there would be practically nothing left when it was all sold out. The stock was getting in very poor condition. There were a great many culls, and the lumber in many cases was damaged, and I thought the best thing to do was to dispose of it at the best price I could get, at the first opportunity. The value of the property which I sold between the time I took possession and the time I made the sale to Mr. Freedorf would be in the neighborhood of \$1000.00.

Q. You included the teams and horses in this lumber, but there was other kinds of property there otherwise than lumber, teams and horses, was there not?

A. There was a wagon or two, and perhaps a sled, but it would be property of that nature that would be used in connection with a lumber yard. There was some paper and some cement, I believe, and I don't recall what all now, but there was paper and cement. It was taken into consideration when the inventory was made. It was all inventoried as the property of the lumber company.

Q. What was the amount of the indebtedness of the Salmon Lumber Company other than the indebtedness to the First National Bank?

A. There were two notes to the Leadore State Bank, I think for \$2500.00 each, upon which some payments had been made, which would reduce them to the neighborhood of \$4500.00. There were some outstanding bills, and I believe a note to a Portland wholesale lumber company, the amounts of which I cannot give you now, but I wouldn't think they would exceed \$1000.00 altogether. I have made payments on these other claims.

Q. And you have made these payments pro rata to the bank and the other claims?

A. Yes, except that I think I haven't given the bank, that is, the First National Bank, quite as much as I have the others. I think it is 20 per cent all around, and I think I have hardly paid 20 per cent to the bank. The total indebtedness of the company when I took charge was, as I understood, between \$23,000.00 and \$24,000.00.

FRANK R. McCORMICK, recalled on behalf of the plaintiff, testified as follows:

Q. Mr. McCormick, inquiry has been made as to the payments made by the Salmon Lumber Company after the failure of the bank, between the time of the failure of the bank and the time that Judge Cowen took charge of the Salmon Lumber Company's affairs. Will you state what payments were made?

A. In the first place, there was an off-set of \$484.-80, made on the 11th of July, 1911. I don't remem-

ber clearly, but I presume that they had that balance on the book, and we off-set it on their note, \$484.80. Then there were six payments made to me at different times by Mr. Slaughter, the manager of the Salmon Lumber Company, in various amounts, aggregating \$2876.00. They are marked here as credited on note 2140, all of them.

PLAINTIFF'S EXHIBIT NO. 27.

No. 2140. Salmon, Idaho, July 1, 1910.

Six months after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$3500.00, Three Thousand Five Hundred Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of 10 per cent per annum, interest to be paid. and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SALMON LUMBER CO., LTD.,

By F. W. CARL, President.

A. D. SLAUGHTER, Sec.

The following endorsements appearing on the back of said note:

July 19, 1911, paid int. 1 year, \$350.00, per Examiner in charge, L. 14.

11-8-11 paid a/c Prin., \$300.00.

11-7- paid by offset, \$484.80.

12-1-11, paid a/c Principal, \$1000.00.

12-15, paid a/c Principal, \$100.00.

12-18, paid a/c Principal, \$50.00.

1-8-12, paid a/c Principal, \$226.00.

1-31-12, paid a/c Principal, \$100.00.

Plaintiff's Exhibit No. 27 is the note upon which the credits were endorsed. I find, however, that one credit of \$100.00 is not endorsed on that note. One credit in addition to those shown thereon, and I want to add that there was \$350.00 interest paid on that note, endorsed July 15, 1911. May I make a correction, Judge?

The Court: Certainly.

A. That off-set of \$484.80 may have been November 7th. I think I testified to it July 11th. It is one of these seven-elevens.

Mr. Richards: It seems you haven't offered that note heretofore in the case.

Mr. Budge: No, that note hasn't been introduced before.

Mr. Richards: Why should the payments be made on that note?

Mr. Budge: I don't know why. I suppose the Receiver would be permitted to endorse them wherever he pleased, unless they requested that they be endorsed elsewhere. We contend that these credits are not on this indebtedness that is proven by the

other notes. You asked for payments that were made and I wanted to clear up the whole situation. We haven't any objection to showing payments, but we want to show where they were applied. I had no interest in showing the payments.

The Court: Is this note you have just shown me here in addition to those you have introduced this morning?

Mr. Budge: That is my understanding, but I didn't offer it this morning because it isn't included in the bill, but when counsel called for the payments I had to produce the indebtedness on which the credits were endorsed.

The Court: Well, proceed.

Mr. Richards: I can't see how it is material to the case at all. If it is a credit on the amount proven it is all right; if it isn't, it shouldn't be in there. It just encumbers the record. I supposed when he offered payments it related to payments applied on the notes that they proved against the company.

Mr. Budge: It was a misunderstanding. Counsel asked if I intended to show payments made prior to the appointment of Judge Cowen, and I told him I would do so, if he desired. I had no interest in showing them, but simply did it for the purpose of complying with counsel's suggestion. I didn't have to show it otherwise, and I wouldn't have shown it otherwise.

Mr. Richards: I don't care. It doesn't affect us if it hasn't anything to do with the indebtedness proven.

Q. Mr. McCormick, do you know anything about a company which has been referred to in the evidence as a lime company? I think it is called—it may be called the Salmon Land and Mines Company—is that it?

A. I don't recall the name of the company, but I do recall the circumstances that we had some bonds of some such company as that, or stock. It was the Lemhi Brick & Lime Company. I know nothing about the financial condition of that company, only from what I have learned from inquiry. The company is bankrupt.

Cross-examination by Mr. Whitcomb:

The information I received as to the financial standing of the Lemhi Brick & Lime Company was from other parties. It was from Mr. Pollard and Mr. Wicklund, who composed the company. They claimed they had some holdings. Mr. Pollard's statement was that if the bank wouldn't help him to do the assessment work he would lose everything he had. My information is that the assessment work was not done, and therefore it is simply my conclusion that they lost it all. I understood from Mr. Pollard that the land was taken up under the mineral laws. I don't know, as a matter of fact, whether they did or did not do the work. I know where the land is located. I have only seen it from the railroad as I passed by. I have seen where their operations were, from the railroad, and the lime coming from there. They told me it is of good quality. I don't know anything about it personally. I don't

question that fact. I haven't heard positively that the work wasn't done.

H. G. KING, a witness duly called and sworn on behalf of plaintiff, testified as follows:

My name is H. G. King. I am one of the defendants and formerly President of the First National Bank of Salmon. I know about the company known as the Idaho Coal & Land Company. It was organized by one J. D. Richards, and Lamborn and myself. It wasn't incorporated. It was a sort of a partnership, more than anything. That company has not any property now. It had property at one time but not since the failure of the bank, and has none now and hasn't had at any time since the failure. I am not familiar with the company called the Salmon Land & Mines Company. There was no such corporation as that. It was a name given, called the Salmon Land & Mines Company, by a young fellow that started in the real estate business—well, I can hardly recall the year, it is so many years ago—he was located on the corner of the Sheenan block, and he just styled himself the Salmon Land & Mines Company. He and his father I think was really engaged in the land and investment and mining business, and he designated his title as the Salmon Land & Mines Company. I know of no property the company has had since the failure of the bank.

I know John R. Wheeler. As to his financial condition I know that he built a house there in Salmon that Mr. Langsdorf is now occupying, and I have never heard of it having been transferred from his

name. If a mortgage was foreclosed on that property, I don't know that. Mr. Wheeler told me that he had some valuable property in Pittsburg. The only information I have is from Mr. Wheeler and Mr. McCutcheon himself. Mr. McCutcheon knows of the property that Mr. Wheeler holds about eight miles out of Pittsburg. The members of the corporation, the Salmon Lumber Company, that is, the stockholders in it, as shown by the articles of incorporation, Plaintiff's Exhibit 16, and also as shown by the assignments which were made to Judge Cowen as trustee, are C. D. Slaughter, my son-in-law; my daughter, C. K. Slaughter; my daughter, A. K. Carl, and J. M. C. Lottridge, formerly cashier of the bank but no relative of mine. I am familiar with certain loans that have been referred to in the evidence, made to Mr. Harry Brown. I know of a loan which was made for \$6250.00, as shown by Plaintiff's Exhibit 15. Mr. Brown, the maker of this note, was in the sawmill business of Lick Creek, Lemhi County, and had purchased two million feet of lumber from the company, and I gave him permission to draw on the bank to a certain extent to cut this lumber. He commenced operations in 1908, I think it was, and made an overdraft by his checks, we honoring his checks as they came in. As soon as they amounted to—the first was \$700.00, and he came in and gave us a note for \$700.00. Then on his next pay roll he still kept drawing his checks on the bank, and when it amounted to \$1500.00 he came in and gave us another note for \$1500.00, and later on another one.

The Court: Did the \$1500.00 note cover the \$700.00 note?

A. Covered the overdraft that had accumulated in the meantime.

The Court: So there were two notes outstanding?

A. Yes. Then later on he covered his overdraft again by giving another note. This continued in this way until it reached the sum of \$6250.00, and these individual notes were consolidated then into this one note.

The Court: This large note of \$6250.00 also covered any open account he had at that time, at the time the note was given—did it cover all of his indebtedness?

A. It covered all of his indebtedness at that time, yes. There was no straight loan, Your Honor, made to him for \$6250.00. It was an accumulation of this indebtedness that had arisen from time to time, and eventually put into one note.

Witness was here shown Plaintiff's Exhibit 28.

PLAINTIFF'S EXHIBIT NO. 28.

No. 5595. Salmon, Idaho, January 2, 1911.

On demand, after date, for value received, and without grace, I, we or either of us promise to pay to the order of The First National Bank of Salmon, \$6500.00, Six Thousand Five Hundred Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid,

at the rate of 10% per annum. Interest to be paid semi-annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

HARRY BROWN.

Due.....190...

P. O.....

Q. Is that a straight loan?

A. Just the same condition as the other loan was. I made it in two separate notes there, because, to discount one of them—I expected to discount one of them, so as not to leave it an excess loan.

Q. It was not discounted?

A. It was not discounted. I failed to discount it. That was my intention in making it that way, because the \$6500.00 would come within the law of an excess loan, and the other \$6250.00 I expected to discount. They were both made approximately at the same time. As a matter of fact, there was an excess loan of \$6250.00 on account of the fact that I failed to discount it.

Mr. Budge: In view of that explanation, Your Honor, I will say to Your Honor that we have become somewhat confused about the books and accounts in straightening out this Brown loan. I offer in evidence this \$6500.00 note, which was given on the

same date as the \$6250.00 note, for the purpose of explaining this transaction, and we claim an excess loan of \$6250.00, which we pleaded, but I wasn't aware of just how the matter was made up, of what the loan consisted.

The Court: When both of these notes were out, Mr. Brown owed, on account of the two notes, \$12,750.00?

A. That is right, Your Honor.

The Court: One note of \$6500.00 and one of \$6250.00?

A. Yes, sir.

Mr. Richards: Of course the dates vary somewhat from your pleadings, and the amount varies entirely from your pleadings.

Mr. Budge: I shall aske leave to amend the bill, in view of the fact—the dates which we pleaded here were the dates shown on the books, which at times did not correspond, but the numbers were the same in most instances, and there were so many books and accounts here that we selected the wrong book to give the dates from, but I think with this explanation we will ask leave to amend the bill to conform to the proof in this regard, as in respect to the \$3500 loan which was pleaded as \$2500, and the dates of these other notes.

The Court: You may proceed, Mr. Budge.

Mr. Budge: I will ask the Court if the bill may be amended accordingly.

The Court: In what respect?

Mr. Budge: I desire to amend the pleading to show that on this date there was the excess loan made of \$6250.00, and the paragraph will have to be amended just a little bit in its phraseology, so as to comply with the proof which is adduced here, and also to amend it in showing the loan made to the Salmon Lumber Company.

The Court: You are not asking to increase the amount which you claim was excessive here?

Mr. Richards: Yes, they are increasing it.

The Court: What I am trying to get at is what you want to do. What is the amendment you want to make in regard to the Brown loan?

Mr. Budge: I shall have to ask that the allegation be amended to show that between certain dates, which were named by Mr. King, Mr. Brown became indebted up to a certain amount, and that on January 2nd, the date shown by these notes, these notes were taken, and representing the loan which was then outstanding against Mr. Brown. Now we have pleaded here that on the 19th day of July Mr. Harry Brown was owing the bank \$3000.00, and an indebtedness of \$603.80 on an overdraft, and that they made another loan to him of \$3000.00 on that date, which makes \$6603.00, and that on the 12th day of January, 1911, they made him a loan of \$6250.00, so that there is no increase in the indebtedness at all; it is simply a statement different from the allegations here as to the manner in which it arose.

The Court: This \$6500 note takes the place of those two \$3000 notes?

Mr. Budge: I assume that that is the case, under the explanation of Mr. King; I assume that the overdraft was covered by those notes.

The Court: You may amend.

Mr. Budge: And I want to ask you at this time permission to attach to the Fourth Amended Bill that schedule of overdrafts attached to the Second Amended Bill. It is by reference, but it has never been really attached to it. I would like to have it taken from the Second Amended Bill and attached to the Fourth Amended Bill.

Q. Now, Mr. King, are you acquainted with Mr. Guy E. Bowerman, the defendant?

A. I am. I think I attended all meetings of the stockholders and board of directors of my bank held between the first of January, 1909, and the time when the bank suspended business in 1911. The records would show it. I don't remember at present of being absent. I recall no meeting, either of stockholders or directors, at which I was not present. I think I was always present. Mr. Bowerman was never present at any meeting of stockholders or directors, special or regular.

Cross-examination by Mr. Richards:

We never notified Mr. Bowerman of any meetings.

Mr. Budge: Just a moment. I move to strike that, as immaterial, upon the ground that the by-laws fix the date when regular meetings are to be held, and that no notice would be necessary as to them and he would be presumed to know when those meetings were held.

The Court: You asked about special meetings as well.

Mr. Budge: I mean as to regular meetings.

The Court: Well, the evidence may go in, and it will be considered for what it is worth.

We only had one copy of our by-laws, the one spread on the minutes, the one introduced here today. We didn't notify Mr. Bowerman that we had any by-laws. We just passed the by-laws there by the President and directors, and had them spread on the minutes of the meeting, and didn't have any copies printed of them and never sent him a copy, not to my knowledge. I think Mr. Bowerman, during the times mentioned here, lived at St. Anthony all the time. Anyone leaving from Salmon to St. Anthony, or from St. Anthony to Salmon, it would take practically a little over three days, or approximately three days. You have to lay over at Armstead at night. In coming from St. Anthony you first of all change at Idaho Falls; then you go on up to Armstead and the trains arrive there, I think, about three o'clock in the morning, and then you wait until eight o'clock, when the train leaves there; and then the train runs every other day. In the years 1906, 1907, 1908 and 1909, before the railroad was in there, it was a question of a two-day trip by stage from Armstead, and that continued up until the railroad was built. I forget the date the railroad run in there. 1910, yes, sir, it was. I know it was, now. Mr. Bowerman never made any trip, and we never made any arrangements to pay any expenses for Mr. Bowerman.

There was offered in evidence published statements of the condition of the First National Bank of Salmon, published in the issues of the Lemhi Herald, February 10th, 1910, July 7th, 1910, September 8th, 1910, November 17th, 1910, and March 23rd, 1911, which said statements were marked Plaintiff's Exhibits 29 to 33, inclusive. Said exhibits were admitted upon condition that it be shown that defendant Bowerman had knowledge of said published statements. There was also introduced and received in evidence a letter written by defendant Bowerman and marked Plaintiff's Exhibit 34, and also Plaintiff's Exhibit 35.

PLAINTIFF'S EXHIBIT NO. 34.

St. Anthony, Idaho, August 29, 1911.

Mr. H. G. King,

Salmon, Idaho.

Dear Sir:—

Subject to our conversation regarding the surrender of the stock of the First National Bank of Salmon.

First, let me say by way of explaining my position, that I do not now, and never have considered myself in any way responsible for the management of the bank and its failure, as I have never had any part whatever in actively conducting its business, and whatever censure, if any, may attach to those who have been in active charge, cannot in any way be considered in connection with the writer. As a nominal director of the bank, I commenced in July, 1910, writing the President of the institution and

warning him as to what in my judgment would be the consequences if the policy of the management was not changed, various matters corrected and improved and more of the notes collected, and the reserve kept up. I have also written the vice-president along the same lines. Having been a director in the institution, I felt that I would not have been discharging my duty had I not called your attention at various times, in no uncertain terms, to what seemed to me to be a very hazardous manner of conducting the bank. And this, you know, I have done repeatedly in the strongest language at my command. I commenced, as I say, in July, 1910, and I was prompted to do this by seeing the statement of the bank which was published under date of June 30, 1910. Should there be any question with any of those that you may be associated with as to whether or not this statement is true, you can no doubt produce them the original letters, and if not, copies can be furnished from my office. At no time was I consulted, either as to the management of the bank, its business transactions or its policy, and, as an illustration of this fact, I would say for your information that until after the Langsdorf purchase was made and the deal closed, I knew nothing whatever about it.

Also, in connection with the erection of the bank building, I was never advised that such a move was contemplated and knew nothing whatever about it until after the building was finished. I also state a fact when I say that I have never even received a statement of the condition of the bank, from the

bank, either the usual published statement or one for my personal use, without making a special request, and in some cases I have had to write several times before the statement was sent me. The conditions so far as obtaining desired information in regard to the condition of the institution were so unsatisfactory that prior to the January meeting of the stockholders and the election of directors, I had fully determined to sever my connection with the institution as a director, and I believe that an examination of your records will show that I have not accepted or qualified as a director since January, 1910, at least, I do not recall the fact of having done so.

Please understand that what I have said above is no complaint, it is merely a statement of facts, all of which is preliminary and not germane to the subject matter; the latter being a proposition I wish to make to whoever may be interested, in regard to my stock. I wish to say further, from what I can learn of Mr. Yeager, the present receiver, and his methods of doing business generally and in this case in particular, I am thoroughly convinced and firmly believe that he will not only be able to pay off all outstanding obligations, but will save something for the stockholders. Keeping that thought in mind, I can see no reason for me to surrender my stock without consideration. As I understand the offer, Mr. Emerson Hill and his associates propose to take up the business of the First National Bank and continue it, providing the \$50,000 in stock, now outstanding, will be turned over to them without cost. While I realize the value of this

offer to those who have been actively engaged in the management of the bank and are in consequence responsible for the present condition of affairs, personally, I can only view it from a business standpoint. The ethical, or what might more properly be termed the sentimental part, does not appeal to me as it might with a resident stockholder whose local pride was at issue. As a business proposition, I admire the judgment and foresight of the men making this offer, as, in my opinion, it is a most profitable business undertaking and will result, in a few years, in a profit of \$50,000 to those interested.

I would like at this time to discuss their offer and make such suggestions in connection with the reorganization as nearly thirty years of practical banking experience prompts, but this letter is already too lengthy. This is my proposition: If you will pay me \$6,054.25, either in cash or good paper maturing within the twelvemonth, I will surrender my stock; or, if more acceptable, I will add to this \$6,054.25 that you are to pay me, the sum of \$3,943.75, and take \$10,000 interest with those who are to reorganize. Certainly, under new and competent management, with ordinary business prudence and alertness, and a conservative expense account, a very large per cent of the assets could eventually be collected in full. There is no doubt a considerable prospective loss in the building and fixtures account, but I understand the income from this property is \$2700 annually and it occurs to me that say \$700 of this amount might be set aside each year for taxes and

insurance, or whatever part of the \$700 is necessary to meet these expenses, and \$2000 applied each year toward reduction, thus gradually reducing the loss. The bank has \$50,000.00 capital, \$15,000.00 surplus, and there must be in the neighborhood of \$10,000.00 accrued interest. It seems to me to be utterly impossible for the assets of any bank to shrink one-half of this amount unless it has been intentionally and maliciously gutted. I mean that, in my opinion, it is impossible for such a shrinkage if the reorganization is affected and time enough taken in the usual course of business to nurse along and strengthen the weaker loans. My experience has been that a mighty rotten condition has existed in any institution where 90% of its notes cannot be collected, by taking a reasonable length of time and giving them vigorous attention, and I do not believe any such condition of affairs prevails in the First National Bank of Salmon with such men as Mr. Sinclair and Mr. Andrews on the board. Certainly Salmon and its vicinity is not permanently bankrupt. I believe that business conditions have touched bottom and any change whatever must be for the better. Prior to closing, as I understand it, the bank had an excellent reputation in that locality, controlled a large per cent of the outside business, and I know of no reason why, under stronger and more efficient management, it should not continue to be the leading financial institution in that section of the country. The charter and good will of the institution, even in its present condition, provided reor-

ganization can be quickly effected, should be worth, to live, active men, \$25,000. In view of all the conditions, I consider my offer an exceedingly fair one and especially so, as all of the other stockholders seem to be willing, for reasons best known to themselves, to surrender their entire holdings, making the cost to these new investors merely nominal. I would much prefer to put in a little additional money, as I have suggested in this letter, and join the reorganizers in the rehabilitated institution, rather than to accept the amount which I have named, as I firmly believe and would confidently expect in a few years to recover the full amount of my original investment.

All of which is most respectfully submitted for your consideration.

Yours truly,

G. E. BOWERMAN.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT NO. 35.

Monday, March 29, 1909.

H. G. King,

Salmon, Idaho.

Dear Harry:—

I have received your letter of March 21st, and also the newspaper account of the taking over of Langsdorf & Company's business, but it did not seem to me that the newspaper item was particularly friendly to the First National. This, of course, may be imagination on my part, and I do not know that it would make very much difference, anyway, but I

would be pleased to know if everything is harmonious so far as the paper and the bank are concerned.

I, of course, do not know what the accrued interest on his loans amounted to, but in purchasing a bank the rule is to pay 90% of the accrued interest and 5% of the deposits which do not bear interest; or, in other words, you figure up the accrued interest on the loans and discounts, deduct 10% therefrom; figure 5% of the check deposits, and add the two together, and this is the price of what is termed "the good will." Figure that up and see how near it comes to \$14,500.

I believe the consolidation was a good business move, but of course it makes an opening for another bank, which was to be expected, and I understand that Quarles and Edwards are organizing a banking and trust company, and of course they will get their share of the business.

The Bank Examiner has been here and he told me he had just been to Salmon so if you get time, better come out and we will have a medicine talk.

Yours truly,

G. E. BOWERMAN.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

FRANK R. McCORMICK, re-called on behalf of the plaintiff, testified as follows:

Q. Mr. McCormick, in Plaintiff's Exhibit 34 appears this language: "As a nominal director of the bank, I commenced in July, 1910, writing the presi-

dent of the institution, and warning him as to what in my judgment would be the consequences if the policy of the management was not changed, various matters corrected and improved, and more of the notes collected, and the reserve kept up. I have also written the vice president along the same lines." Did you find among any of the papers or files received by you, as receiver of this institution, any letters signed by Mr. Bowerman, addressed to Mr. King or to the vice president, the president or vice president of the institution, containing any warning such as is indicated by this letter, or any warning at all?

A. I did not. Plaintiff's Exhibit 34 is the only letter among any of the papers received by me that relate to that subject at all, to the mismanagement of the bank.

The aggregate of the claims against this institution filed with me as receiver is \$115,661.78. The amount unpaid upon the claims so filed is \$57,314.16. I have in my hands or under my control as receiver, assets and property amounting roughly to \$42,000.00, which can and will be applied to the payment of the balance due and owing upon these claims. This is the amount as listed. Did you wish my estimate as to the value of them?

Q. Yes, if you can give the value.

A. I should say there wouldn't be more than \$12,000.00 collected of the \$42,000.00. The \$42,000.00 is the face value. That will leave \$45,000.00 unpaid. That, I might explain, is of the principal. That doesn't include interest.

It was here stipulated that of the amount of the bank's claim against Sinclair, said claim being something over \$10,000.00, the receiver will not realize to exceed 50 per cent, taking into consideration all payments that have been made on said indebtedness and all that will probably be made from the Sinclair estate.

It was also stipulated that the abstractor of Lemhi County and the Deputy Assessor, if present, would testify that John Lottridge owns no property in Salmon City and that the only property possessed at all or in which he has any interest stands in his wife's name, and that there are mortgages covering that, and that there is no equity in it out of which the bank could satisfy any claim, and it was further stipulated that said property is not worth more than \$4500.00 and that it is mortgaged for \$4500.00. Plaintiff's Exhibits Nos. 36 and 37 were then offered and received in evidence.

PLAINTIFF'S EXHIBIT NO. 36.

This Indenture, Made the 10th day of November, in the year of our Lord one thousand nine hundred and ten, between Alice S. Lottridge and John Lottridge, her husband, of Salmon, County of Lemhi, State of Idaho, the parties of the first part, and Ada D. Slaughter, of Salmon, County of Lemhi, State of Idaho, the party of the second part,

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Fifteen Hundred Dollars, of the United States of America, to them in hand paid by the said party of the second

part, the receipt whereof is hereby acknowledged, have Granted, Bargained, Sold and Conveyed, and by these presents do Grant, Bargain, Sell and Convey unto the said party of the second part, and to her heirs and assigns forever, all of that certain lot, piece or parcel of land, situate, lying and being in the Salmon City Townsite, County of Lemhi, and State of Idaho, and particularly described as follows, to-wit:

Lot numbered Seven (7) of and in Block number Five (5) of and in North Salmon Village, as the aforesaid lot appears upon the official plat of said village, now on file and of record in Book 1 of Plats, at page 1, in the office of the County Recorder, Records of Lemhi County, Idaho. Together with all water rights, ditches and ditch rights, all buildings and improvements belonging thereto.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This Grant is intended as a mortgage to secure the payment of one certain promissory note of even date herewith, executed and delivered by the said Alice S. Lottridge and John Lottridge to the said party of the second part, of which note in words and figures following, to-wit:

Salmon, Idaho, Nov. 10th, 1910.

One year after date, for value received, and without grace, I, we or either of us promise to pay to the order of Ada D. Slaughter, Fifteen Hundred Dollars, in lawful money of the United States of America,

at the First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid at the rate of 8 per cent per annum.

Interest to be paid semi-annually and if not so paid the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sums as the Court may adjudge reasonable as attorney's fees in said suit or action.

(Signed:) ALICE S. LOTTRIDGE.

JOHN LOTTRIDGE.

And these presents shall be void if such payment be made. But in case default shall be made in the payment of the said principal sum of money, or any part thereof, as provided in said note, or if the interest be not paid as herein specified, then and from thenceforth it shall be optional with the said party of the second part, her executors, administrators, or assigns, to consider the whole of said principal sum expressed in said note as immediately due and payable, although the time expressed in said note for the payment thereof shall not have arrived; and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same and all benefit and equity and redemption of the said parties of the first part, their heirs, executors, administrators or assigns, according to law, and out of the money arising from such sale to retain the principal and interest which shall then be

due on the said promissory note, together with the costs and charges of foreclosure suit, including reasonable counsel fees and also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said party of the second part, her heirs, executors, administrators or assigns, by reason of the permission hereinafter given, with the interest on the same hereinafter allowed, rendering the overplus of the purchase money (if any there shall be) unto the said Alice S. Lottridge and John Lottridge, her husband, parties of the first part, their heirs, executors, administrators or assigns. And the said parties of the first part do hereby further covenant, promise and agree to and with the said party of the second part, to pay and discharge, at maturity, all such taxes or assessments, liens or other incumbrances now subsisting, or hereafter to be laid or imposed upon said premises, or which may be in effect a prior charge thereupon to these presents, during the continuance hereof, and in default thereof, the said party of the second part may pay and discharge the same, and may, at his option, keep fully insured against all risks by fire the buildings which are now or may be hereafter erected thereon, at the expense of the said parties of the first part, and the same so paid shall bear interest at the rate of 8 per cent. per annum until paid, and shall be considered as secured by these presents and be a lien upon said premises, and shall be deducted from the proceeds of the sale thereof, above mentioned, with interest as provided.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of Frank L. Plummer.

ALICE S. LOTTRIDGE. (Seal.)

JOHN LOTTRIDGE. (Seal.)

State of Idaho,
County of Lemhi,—ss.

On this tenth day of November, 1910, before me, Frank L. Plummer, a Notary Public in and for said County, personally appeared Alice S. Lottridge and John Lottridge, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal.)

FRANK L. PLUMMER,

Notary Public.

State of Idaho,
County of Lemhi,—ss.

I, J. L. Kirtley, Jr., County Recorder in and for the State and County aforesaid, hereby certify that the above and foregoing is a full, true and complete copy of a mortgage appearing in Book G of Mortgages, at page 72, Records of Lemhi County, Idaho.

And I further certify that there is no satisfaction of the said mortgage, except a partial satisfaction which appears of record in Book F of Mortgages, at page 274, Records of Lemhi County, Idaho.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this 20th day of February, 1915.

(Seal.)

J. L. KIRTLEY, JR.,
County Recorder.

Indorsement: No. 11057. Mortgage.

State of Idaho,
County of Lemhi,—ss.

I hereby certify that this instrument was filed for record at request of Carl D. Slaughter, at 55 minutes past 11 o'clock A. M., this 8th day of June, A. D. 1911, in my office, and duly recorded in Book G of Mortgages, at page 72.

J. L. KIRTLEY, JR.,
Ex-officio Recorder.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT NO. 37.

This Indenture, Made the 2nd day of April, in the year of our Lord one thousand nine hundred and ten, between Alice S. Lottridge and John Lottridge, her husband, of Salmon, County of Lemhi, State of Idaho, the parties of the first part, and Ada D. Slaughter, of Salmon, County of Lemhi, State of Idaho, party of the second part,

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Three Thousand Dollars, of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged,

have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever, all of one certain lot, piece or parcel of land, situate, lying and being in the Salmon City Townsite, County of Lemhi and State of Idaho, and particularly described as follows, to-wit:

All of that portion of Lot Number 7 of and in Block Number 5 of and in North Salmon Village, as the aforesaid lot appears upon the official map or plat of said village, now in file and of record in Book One of Plats, at page one, in the office of the County Recorder, Records of Lemhi County, Idaho, described as follows:

From the northwest corner of the aforesaid Lot Number 7, in Block Number 5, run S. $51^{\circ} 30'$ East 69 feet, thence S. $38^{\circ} 30'$ West 208 feet, thence N. $51^{\circ} 30'$ West 69 feet, thence N. $38^{\circ} 30'$ East 208 feet to the beginning.

Together with all water rights, ditches and improvements belonging thereto.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This Grant is intended as a mortgage to secure the payment of one certain promissory note of even date herewith, executed and delivered by the said Alice S. Lottridge and John Lottridge, her husband, to the said party of the second part, of which note in words and figures following, to-wit:

Salmon, Idaho, March 21, 1910.

On demand, after date, for value received, and without grace, I, we or either of us promise to pay to the order of Ada D. Slaughter, \$3000.00, Three Thousand Dollars, in lawful money of the United States of America, at The First National Bank, Salmon, Idaho, with interest thereon in like money from date until paid, at the rate of 8 per cent. per annum.

Interest to be paid semi-annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible.

And in case suit is instituted to collect this note, or any portion thereof, we promise to pay, besides costs and disbursements allowed by law, such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

JOHN LOTTRIDGE.

ALICE LOTTRIDGE.

(Endorsed on back of note.)

Interest paid in full to June 1, 1911. Ada D. Slaughter.

And these presents shall be void if such payment be made. But in case default shall be made in the payment of the said principal sum of money, or any part thereof, as provided in said note, or if the interest be not paid as herein specified, then and from thenceforth it shall be optional with the said party of the second part, her executors, administrators or assigns, to consider the whole of said principal sum expressed in said note as immediately due and payable, although the time expressed in said note for the pay-

ment thereof shall not have arrived; and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same and all benefit and equity and redemption of the said parties of the first part, their heirs, executors, administrators, or assigns, according to law, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory note. Together with the costs and charges of foreclosure suit, including reasonable counsel fees and also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said party of the second part, her heirs, executors, administrators or assigns, by reason of the permission hereinafter given, with the interest on the same hereinafter allowed, rendering the overplus of the purchase money (if any there shall be) unto the said Alice S. Lottridge and John Lottridge, parties of the first part, their heirs, executors, administrators or assigns. And the said parties of the first part do hereby further covenant, promise and agree to and with the said party of the second part, to pay and discharge, at maturity, all such taxes or assessments, liens or other incumbrances now subsisting, or hereafter to be laid or imposed upon said premises, or which may be in effect a prior charge thereupon to these presents, during the continuance hereof, and in default thereof, the said party of the second part may pay and discharge the same, and may, at his option, keep fully insured against all risks by fire the buildings which are now

or may be hereafter erected thereon, at the expense of the said parties of the first part, and the same so paid shall bear interest at the rate of 8 per cent. per annum until paid, and shall be considered as secured by these presents and be a lien upon said premises, and shall be deducted from the proceeds of the sale thereof, above mentioned, with interest as herein provided.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

Signed, sealed and delivered in the presence of
Frank L. Plummer.

ALICE S. LOTTRIDGE. (Seal.)

JOHN LOTTRIDGE. (Seal.)

State of Idaho,
County of Lemhi,—ss.

On this 19th day of August, 1910, before me, Frank L. Plummer, a Notary Public in and for said County, personally appeared Alice S. Lottridge and John Lottridge, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal.)

FRANK L. PLUMMER,

Notary Public,
Lemhi County, Idaho.

State of Idaho,
County of Lemhi,—ss.

I, J. L. Kirtley, Jr., County Recorder in and for the State and County aforesaid, hereby certify that the above and foregoing is a full, true and complete copy of a mortgage recorded in Book G of Mortgages, at page 70, Records of Lemhi County, Idaho.

And I further certify that no release or partial release of said mortgage appears of record in the Recorder's office of Lemhi County, Idaho.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said office, this 20th day of February, 1915.

(Seal.)

J. L. KIRTLEY, JR.,
County Recorder.

Indorsement: No. 11047. Mortgage.

State of Idaho,
County of Lemhi,—ss.

I hereby certify that this instrument was filed for record at request of Alice S. Lottridge, at 5 minutes past 2 o'clock P. M., this 5th day of June, A. D. 1911, in my office, and duly recorded in Book G of Mortgages, at page 70.

J. L. KIRTLEY, JR.,
Ex-officio Recorder.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

Mr. Budge: You also admit that that is the only property that is shown on the records in his name, or her's?

Mr. Whitcomb. I never heard of his owning any other in Lemhi County.

Cross-examination by Mr. Whitcomb:

I resided in the John Lottridge house situated on the property referred to for some time. It must have been a year and a half. I secured the property by the consideration of a rental I paid. I paid the money to Mrs. Alice S. Lottridge, from whom I rented the property. I did not know at that time that it was community property. That question was never raised and I never inquired. I did not endeavor to ascertain whether I could apply that rental money to any of the indebtedness of the bank or not. I paid \$30.00 a month at first and then it was reduced to \$20.00. I paid a total of four or five hundred dollars.

Q. What were the total assets of the bank when you took charge of it?

A. I would explain that I took charge of the bank in September, but that I was charged with the bank as it stood on the 7th day of June, when it was closed, so that any figures I would give would refer back to the 7th of June, although I was not actually in charge until September. The total assets at date of suspension, \$325,624.12. They consisted of notes, \$279,979.32; other assets, \$45,644.80. The other assets would include everything in the way of assets except the notes. There was the equity in the Pioneer Bank building, the set of bank furniture and fixtures in the Pioneer Bank building, and the set of bank furniture and fixtures in use by the First National Bank. The part of these assets which consti-

tuted overdrafts at that time was something in excess of \$9000.00. The total liabilities at that time were \$273,719.14. That did not include the capital stock which was issued by the bank. I received from an assurance association \$17,000.00 and from the stockholders \$24,364.00. I expect yet to receive from shareholders or stockholders \$2,500.00 to \$3,000.00 from the Sinclair estate, and if I should receive \$3000.00 from the Sinclair estate it would make a total from stockholders of \$27,000.00. Since I have been there I have paid to the depositors of the bank \$58,347.62 and I have on hand at the present time \$90.95. Let me explain: This is from our report made the 31st of December. There have been, of course, some few transactions since that time. No depositors were paid and no dividends paid prior to the time I went in and took charge.

Q. What is the total amount of money which has been collected by you and your predecessors in office as receiver of this bank, the total, gross?

A. There has been \$3250.00 collected by the Comptroller from interest on the bonds that we have held. Counting that, the total amount collected is \$244,729.65, that is money.

Re-direct Examination by Mr. Budge:

But after all, as a summary of the condition so far as the assets and liabilities are concerned, there will be approximately \$45,000.00 unpaid, taking into consideration what I may yet realize from assets now in my hands.

Re-cross Examination by Mr. Whitcomb:

I stated that I had about \$45,000.00 assets now, on which I would realize about \$12,000.00.

It was stipulated and agreed that Frank M. Pollard, to whom loans were made as set forth in a bill of complaint, said loans being evidenced by plaintiff's Exhibits 13 and 14 is insolvent, and has been since the failure of said bank.

FRED V. BISCOE, being re-called on behalf of the plaintiff, testified as follows:

With reference to the Harry Brown loans, there was no security taken until after the receiver was in charge. There was no security taken at the time the loan was made for the Pollard loans or for any of the loans of the Salmon Lumber Company. I believe there was some security taken for the Pollard loan in the shape of the mortgage which is referred to in the cross-complaint of the receiver, in the case of Western Loan & Savings Company against Pollard, which is shown by Plaintiff's Exhibit 24, after the receiver or the bank examiner had charge and that is the proceeding in which the bank realized \$150.00 on the security so taken and is the only amount that has been paid on those loans.

Cross-examination by Mr. Millsaps:

There was a lot taken on the Pollard loan; that was the one Mr. Budge mentioned and that is still owned by the bank. The value of the lot has been estimated by two real estate agents. We still own the lot. We bought it for \$150.00. We have been trying to sell it.

Cross-examination by Mr. Whitcomb:

I am not entirely familiar with just what property was turned over to the bank by Harry Brown. Most of that was turned over before I was in charge. I understand that he gave a mortgage on his property. I couldn't say personally whether Brown turned over to the bank all his property or not. I know he turned over some. I don't know how much lumber he turned over to the bank.

Re-direct Examination by Mr. Budge:

I have offered this lot for what we bought it for and we have had no offers to purchase at that price or any other price.

FRANK R. McCORMICK, being re-called on behalf of the plaintiff, testified as follows:

The chattel mortgage given by Brown after the failure of the bank covered a sawmill from 30 to 40 miles from Salmon, and the lumber, the sawed lumber—I don't know how many feet; there were several hundred thousand feet. Brown gave me written authority to dispose of that as best I could and apply it on his debts. That lumber I had hauled to Salmon, paying \$10.00 or \$10.50 a thousand for the hauling; rented a lot in Salmon and started into the lumber business, selling off as we could from time to time. That lumber account, the expense of the hauling and all, used up all the proceeds. There wasn't \$10.00 one way or the other; I can tell from the books exactly what it was; but I don't think there is \$10.00 left, and there is still a bill outstanding that would wipe that out. The sawmill we sold for \$1000.00 which was credited to Brown. That is all the prop-

erty we received from Brown and all we have received upon the indebtedness of Brown to the bank was \$1000.00.

With reference to the overdraft of Mr. John R. Wheeler I made an investigation concerning what property Mr. Wheeler had in Pittsburg, through John S. Went, an attorney of Pittsburg that had acted for me in some other matters. He reported that he found no property belonging to Wheeler except a dwelling house in Sewickley, one of the suburbs of Pittsburg, but that that was so covered by mortgages and other liens that it would be a useless expense for us to take a judgment against Wheeler.

Cross-examination by Mr. Whitcomb:

I sold the lumber after it arrived in Salmon at various prices, whatever we could get, in little lots; some of it as high as \$20.00 a thousand, but it deteriorated very rapidly. I don't know that values were going down; there wasn't much demand and most of it was sold for flumes and other purposes where rough lumber was used. I knew what the market value of lumber was about the time I came to Salmon. I inquired. I found that good lumber in the yards there was selling some of it as high as \$25.00 a thousand. This was rough lumber that I got. There were no teams or sleds or wagons or anything of the kind turned over to me by Mr. Brown.

Q. Did you know what the value of this sawmill was that you sold for \$1000.00?

A. I saw the mill; I inspected it. I don't know much about sawmills, but I should have supposed

that the mill was worth \$3000.00, if it were in any place where it could be used. But it was 40 miles from Salmon, in the woods, and \$1000.00 was the best offer we got. I don't know what creek the mill was on. There was plenty of timber there and the sawmill was well located for sawmill purposes if there had been any demand for lumber. I never heard of Mr. Brown having purchased some timber from the government. When I visited the premises there was no cut timber or uncut timber or timber which was in the form of dimension stuff that I know of, and I saw no logs. I don't know whether Brown had any interest in any standing timber. The question was never raised.

Cross-examination by Mr. Millsapps:

The chattel of which I spoke was given to the receiver for the bank.

Cross-examination by Mr. Whitcomb:

A certain paper was here marked Defendant's Exhibit 1.

I don't recall ever having seen Defendant's Exhibit 1. I do not know how it happened to be among the papers of the bank. I would explain that at one time I went down to the Salmon Lumber Company with a representative from the Comptroller's office, Comptroller of the Currency, and Mr. Slaughter, the manager, spoke of an inventory that had been made and he said that the inventory showed some figures,—he had before him a paper and whether this is the one or not I don't know. I didn't examine it. I didn't take it away with me.

WILLIAM C. SMITH, a witness duly called and sworn, on behalf of the plaintiff, testified as follows:

My name is William C. Smith, and I reside at Salmon. I have heretofore been Clerk of the Court at Salmon for eight years. My term expired in January, 1911. I was clerk for eight years preceding that and since that time I have been an abstractor, in the abstract business at Salmon. I think I am familiar with the records of Salmon, and the ownership of property in and about Salmon. I know Mrs. Saphronia Pollard of Salmon. I know what property she owns at Salmon. It consists of a dwelling house where she lives, a home. I think that is all she owns now. It is encumbered for, I think, about \$3000.00. It is mortgaged for most all it is worth and she has no other property that I know of. There is a declaration of homestead on this property.

Cross-examination by Mr. Whitcomb:

All I know with reference to her property is what is disclosed by the records. I know of some personal property that is mortgaged, but I know nothing of any that isn't mortgaged. I don't know whether she has any United States bonds or not and I don't know whether she has made investments in real estate elsewhere than in Lemhi County.

Q. Do you not know that some time ago she owned a mortgage on some property in Lemhi County to secure a note for about \$6000.00?

A. The mortgage was for \$9000.00, I think. She held it. I know what she has done with it. She sold it to the Pioneer Bank. I don't know what she did

with the money. The sale was perfected prior to 1911, I can't tell you the date. It was while I was in the clerk's office; I don't know just when; I can't tell you exactly. There was an assignment of mortgage recorded at that time. Know that since the failure of this bank Mr. and Mrs. Pollard have been taking trips through the east and the south. I presume they were pleasure trips. They were east, and visited in the east and south. I don't know how they did raise the money, to take that trip. Mr. and Mrs. Pollard are old residents of Salmon. I don't believe they have made more than one trip out of Salmon in the last thirty years. I recall only the one trip and that was the one since the failure of the bank and I have resided there for forty-seven years. I am well acquainted with them as neighbors and have known them for forty years. They are now making a living by Mrs. Pollard running a bakery, selling bread, and Mr. Pollard is peddling it, peddling the bread.

Re-cross Examination by Mr. Whitcomb:

I think Mr. Pollard does work around there by the job whenever there is brick work there.

Plaintiff rests.

Mr. Richards: I move to dismiss the case as to the defendant Bowerman because they have not in anywise brought him within the terms of Section 5239 of the Revised Statutes of the United States as interpreted by the courts of the United States. I can present it very briefly.

The Court: I think, Judge Richards, that I will prefer to consider this motion at the close of the trial.

I will consider it now if you press it now, but I am rather disinclined to hear you at the present time unless you say that you rest your case.

Mr. Richards: I wanted to get away if possible, and it would save my remaining over another day to present any testimony.

The Court: I don't think I would want to decide the question one way or the other offhand, without giving it some consideration.

Mr. Richards: I have it very carefully briefed.

The Court: Yes, but I wouldn't have time to consider it now. If you rest your case, of course then I will hear you, but if you make this motion now and argue it I must either decide it now or hold you here until I can give it consideration.

Mr. Richards: I would appreciate it if we could have until morning, if the court is not going to hold an evening session, to determine the question. My judgment is that they haven't made any case at all, as I understand it, but the counsel who is associated with me is perhaps somewhat doubtful, and hesitates about taking the responsibility without further consideration.

At 9:30 a. m., Wednesday, March 10, 1915, the court resumed its session pursuant to adjournment.

Mr. Richards: If the court please, we have concluded to stand upon our motion, so we will have no further testimony so far as Bowerman is concerned.

Mr. Budge: It is understood that the defendant Bowerman rests then.

Mr. Millsaps: Not rests, Your Honor, but we say we stand upon that motion to dismiss. We will not introduce any testimony in his behalf but will stand upon that motion.

FREDERICK V. BISCOE, a witness heretofore duly sworn, being called on behalf of the defendants, testified as follows:

Defendants' Exhibit No. 1 was found by me in the office we now occupy, the receiver's office. That is where I keep the papers belonging to the First National Bank. I brought that down with me when I came here as a witness in this case. I couldn't say positively when I first saw that paper; possibly some time last spring. I have seen a good deal of Mr. Yeager's handwriting. I couldn't positively identify it. I know his signature. I wouldn't say positively that the lines written at the bottom of the last page of this exhibit are in the handwriting of Mr. Yeager. It looks like Mr. Yeager's handwriting but I am not sufficiently familiar with it to absolutely identify it.

H. G. KING, a witness heretofore duly sworn, being called on behalf of defendants, testified as follows:

My name is H. G. King. I reside at Salmon, Idaho. I am the same Mr. King mentioned in Plaintiff's bill of complaint as being the president of the First National Bank of Salmon. I was holding such office at the time I made the purchase of the Langsdorf & Company Bank. In round figures, we received in notes from Mr. Langsdorf on the purchase of the bank \$167,000.00, all drawing 10 and 12 per

cent interest except one note, which was drawing eight per cent interest. When Mr. Langsdorf brought over the \$167,000.00 worth of notes, we paid him \$14,500.00. That was all the money we paid him at the time. Having purchased the bank of Mr. Langsdorf, whereby we took over his business, he had to turn over to us all the deposits. He first of all turned over the notes, amounting to \$167,000.00, and we paid him \$14,500.00. The balance was placed to Mr. Langsdorf's individual credit as a deposit in the bank, the difference between the two amounts amounting to about \$140,000.00. From time to time, as Mr. Langsdorf checked up with his depositors, over his preparation to turn them over to the First National Bank, as soon as he had his books balanced, he would give them a check on the First National Bank on his account, and they would bring it over and deposit it in the First National Bank. In that method the deposits of Langsdorf & Company were transferred to the First National Bank. So we weren't out anything on the hundred and forty some odd thousand dollars. The results showed that the notes we secured from Langsdorf & Company were practically all good, because they have all been paid since then. The majority of the big notes, the large notes, were all paid within ninety days; all the excess notes we got from Langsdorf with the exception of one were paid in ninety days from the time we made the purchase. The results showed that the interest that we received on the notes that we purchased of Langsdorf more than offset the pre-

mium that we paid for the business, because we weren't out only \$14,500.00 for \$167,000.00 worth of 10 and 12 per cent paper. Besides that, we had the benefit of the depositors' money that was turned over to us in lieu of these notes, as an offset against those notes, creating a liability against the bank for which we didn't pay any interest. Furthermore, Mr. Langsdorf re-deposited his \$14,500.00 and took certificates of deposit on the First National Bank, drawing only four per cent in interest, which he left there for, I think, a year. The First National Bank lost nothing on account of paying this premium of \$14,500.00. The records will show that we really made money and increased our business. We doubled our business in fact. Our resources went up just double what they were before. About three or four days before we purchased Langsdorf, I consulted Mr. Claude Gatch, the National Bank Examiner, as to the advisability of the purchase and asked him if he would be willing to meet with the Board of Directors and give us his advice in the matter. Mr. Gatch met with us that evening, in the directors' room, and went over the situation, and I asked him, from a legal standpoint, more than anything, what position we would be in if we purchased Langsdorf, provided there were any loans in excess of the required limit that a bank was supposed to loan. Mr. Gatch informed myself and the board of directors that if we purchased Langsdorf & Company, that those loans would come within the prescribed limits, according to section—5248, I think

it is, or 5208, relating to excess loans, but that they did come under the head of commercial paper, bought against existing values, in good faith. That is the way he explained the statute to me. I was conversant with the statute at the time. He assured me that those loans, if there were any in excess of the prescribed limit, would not be classed as excess loans, because they would come within the meaning of the law as commercial paper. Then the board asked him quite a number of questions. I remember that Mr. Andrews cross-examined him, and others of the board cross-examined him, or, rather, asked him, and he advised us in the premises that he thought, under all the circumstances, that it would be a good deal for us to buy out Langsdorf & Company. There was another thing which influenced us to take this action. I knew that another party was figuring on starting a bank in Salmon and that he had made a proposition to Mr. Langsdorf to pay him \$12,500.00 premium for his business. That offer had already been made to Mr. Langsdorf and I knew it.

Q. Now with reference to the certain loans which appear by the book to have been made by the First National Bank, and which you have been shown here for the purpose of showing negligence, I wish to call your attention to the one made in November, 1909, to Peter McKinney, in the sum of \$14,000.00, and inquire whether that was a loan made by you.

A. That was a note signed by two parties, I think, J. McPherson, and H. S. Waters, payable to a third party, for the purchase of certain property,

and Peter McKinney endorsed that note and sold it to me, and I bought it as commercial paper, and it was afterwards paid in full. I might say that Harry Loveland never reported that to the Government as an excess loan. He was a National Bank Examiner.

Q. Can you explain the two notes, one for \$8000.00 and one for \$6000.00, dated January 26, 1910, given by McPherson & Waters?

A. Yes, I can explain that. The \$8000.00 note was simply a note that I negotiated for them, and sold it to the First National Bank of Dillon, and B. F. White held that note. I didn't hold the note at all. You won't find that it was in the bank until later than that. The \$6000.00 note was a separate transaction, within the prescribed limit.

Q. On the 2nd day of February, 1910, the records show one note for \$3000.00 to Mrs. A. Eckersall, and one note for \$6000.00. Explain that.

A. It is listed here in the register that is presented every month to the board of directors, as a note of Arch Eckersall, and secured by a mortgage in September for \$6000.00, another note to Lizzie Eckersall, his wife, secured by a mortgage on cattle that she owned, for \$3000.00.

The note given by G. H. Monk & Company, for \$8000.00 was taken from Langsdorf & Company, and was afterwards paid in full.

Another note from G. H. Monk & Company for \$6000.00 was a loan direct from our bank, and within the prescribed limits.

The loan of \$7100.00 to Peter McKinney, endorsed by Mulkey, I purchased from W. H. Mulkey. That was a straight out purchase, under the head of commercial paper, endorsed by a third party and that was paid in full.

As to the W. S. Hammond notes, one for \$1000.00 and the other for \$6000.00, the one for \$6000.00 was made to old Wellington Hammond who lived up on the Pahsimari. The \$1000.00 note was made to William Hammond. Both men are well known there. They are both W. S. They are marked in the register "W," but I know that of my own knowledge,—making the deal with Wellington Hammond and the deal with William Hammond, but it has only got "W," just the initial, there. They are men well known there. There would be no other record of those loans except the notes themselves and they are paid.

The three notes given by H. W. Soule and others in the sum of \$5000.00 each were paper taken from Langsdorf and eventually paid in full. The notes to L. T. Ramsey, one for \$6000.00 and the other for \$2000.00 were, I am sure, speaking from memory, renewal loans. One was L. T. Ramsey and the other, I think, was A. E. Murphy, endorsed by Ramsey, but they were made some 12 or 18 months before December 31, 1910. A. E. Murphy was Dr. Murphy. I would have to trace it back to the original note. If I had the note of course I could trace it back. It would take some little time to look it up, because the note was made originally at the time that Ramsey

bought some sheep, and that was in 1908, I think it was, and I would have to go through all the records and trace the renewals, because it wasn't a new loan at that time. I really don't know whether the \$6000.00 and \$2000.00 notes were paid. The receiver could tell the condition that they are in today; I don't know. I know that part of them have been paid; I know that much, but what there is left I don't know. I stated that the \$6250.00 Pollard note was simply the accumulation of prior existing notes and the \$1700.00 Pollard note was to cover their joint overdrafts. I allowed them to overdraw to the extent of \$1700.00 because Mr. Pollard was putting up a building and he had a contract for a building with Mrs. Sheenan. Mr. Pollard wanted to burn 750,000 brick and he came to me and said that his wife was willing to go security for him and that all he wanted me to do was to advance the money to pay the labor for the men. He had the machinery to make the brick with. He went to work, and at the end of every month drew checks on the bank for his pay roll. I honored his checks, and on the Monday morning following Mr. and Mrs. Pollard would come in and give me a note for the amount of the overdraft. In that way we had several of Mrs. Pollard's notes, until it became \$6000.00. That was then put into one note. In the meantime he had a brick yard there with about 750,000 brick. After these brick were disposed of Mr. Pollard was to come in and pay the proceeds that he got from the brick, the sale of the brick, to reduce the indebtedness to the bank. In

the meantime, there was a slow sale for brick, and he started to build a brick house, explaining that that would be the best way to utilize some of those brick and he put up that house, and eventually, to complete it, and to pay the carpenters and so on, he had to put a mortgage on it, which he did through the Western Building & Loan Association. The price of property, after he got that building finished, deteriorated very rapidly. We had quite a reaction in real estate there, in values, and Mr. Pollard was himself unable to retain it. Later on I think Mr. McCormick sold it, or rather the Western Building & Loan sold it. I took a mortgage on the building to secure these brick, and the Western Building & Loan had the first mortgage on it, and they foreclosed on it and left us simply with the equity in, as we thought, the brick, and in that way created somewhat of a loss. In the meantime Mr. Pollard had contracted another building with Mrs. Sheenan, and put quite a good many of these brick into that building, and he got into a law suit with Mrs. Sheenan, and I don't know today whether that law suit was ever settled. If so, it was during my absence. In that way Mr. Pollard did create an overdraft, by using some more money, by drawing on me, at the time he was erecting these buildings; and I granted it for the simple reason that I expected that he would get his contract money in full on the completion of the work, which he did not, and thereby I was misled; my judgment didn't pan out the way I anticipated it would. I certainly had reason to believe

that Mrs. Pollard was good security at that time for the simple reason that I purchased Pollard's ranch some years before then, at a price of \$30,000.00 and paid them the money, except a mortgage of \$6500.00, given to Mrs. Pollard for her share in it, and I knew at the time I made this loan to Mrs. Pollard, to begin with, that she held this mortgage of \$6500.00. She was doing business in her own name, and she signed those notes as a principal, and Mr. Pollard did not sign the notes as principal, and I didn't make the loan to Mr. Pollard, but to Saphronia A. Pollard, and I felt sure our money was perfectly safe, because I knew at the time that she had this mortgage and note for \$6500.00, secured by 480 acres of land that was unincumbered, within a mile of town. The loans to the Salmon Lumber Company, Mr. Brown, and Mr. and Mrs. Pollard, were made by an overdraft, and I permitted—John Lottridge was cashier and I was president, and were the ones that honored the checks that were presented over the counter and created the overdraft. As to the loans made to the Salmon Lumber Company: in a general way they were doing a very large business, and how they came to owe us so much money was because they made a contract with two sawmills up at Gibbonsville to take their entire output of lumber for the year. Their original output had been quite limited, of these two mills, and in order to eliminate opposition they contracted with those mills to take their entire output. At that time they were the only two mills bringing lumber into Salmon. As soon as that

agreement was signed by the Salmon Lumber Company, the two mills immediately started in cutting lumber as fast as they could. They run those mills day and night; they hired every team they could in the county, in order to deliver as much lumber as possible to the Salmon Lumber Company. And the consequence was that it came in faster than they had means to meet it, and I stood behind their checks and paid them as they would pay for the hauling and the lumber to these respective mills. One mill alone delivered to them over a million feet of lumber that the year before had only cut about one hundred thousand feet.

Q. Calling your attention to the note dated July 1, 1910, number 2140, was that given to cover overdrafts or was it a direct loan?

A. Well, by referring to the records here I can corroborate my statement that I think that nearly all of those loans given by the Salmon Lumber Company were given to cover overdrafts. I see here where the Salmon Lumber Company had an overdraft of \$3800.00. The next day there is a credit of \$3500.00 given in the shape of a note to cover it. A little later on they were overdrawn again \$2500.00. There is a corresponding credit the next day of \$2500.00, to cover that overdraft. Further on down, on another occasion, I see the account is overdrawn \$3388.76, with a credit of \$3500.00, which would be another note to cover that overdraft. That is simply corroborating the statement I made, that the loans of the Salmon Lumber Company, in-

stead of being direct loans made by the board, were created originally by an overdraft, by cashing their checks and then they came in at the end of the month, or I might call them in and ask them for a note for the overdrafts. Plaintiff's Exhibits Nos. 12 and 19 were for an overdraft. No. 27 is a renewal or consolidation of two or three notes; I don't know how many. Exhibit No. 11 is for an overdraft. The other directors, other than Mr. Lottridge and myself, didn't have any knowledge of these overdrafts, unless they were to refer to the individual depositors' ledger, or go through the individual deposit ledger and examine the overdrafts.

Q. I notice on Page 167 of the minutes of the Board of Directors that it reads as follows: "The monthly statement of loans and discounts was read and approved." How was that monthly statement made up?

A. It was made up by the special discount register that we had, that the Comptroller sent us, and—a circular letter, it was, suggesting that in future a copy of all the loans made during the month be entered in a special discount register and presented to the Board of Directors at the end of the month. Either Mr. Lottridge or myself made up the statement of the records of the loans made during the month. The special discount register was examined by the Board of Directors regularly at these monthly meetings. This book doesn't contain the notes which appear to be excessive loans. They wouldn't appear here in that way.

The Court: Now, just in that connection, show me what was disclosed to the board at a meeting where this minute entry was made.

A. Here are the minutes of the meeting.

The Court: I understand the minutes.

A. It says: "The monthly statement of loans and discounts was read and approved." That is, by the Board of Directors. This was the month of June, 1910, Your Honor, the month of June, approved by the Board of Directors at their July meeting.

The Court: What was it that was read?

A. We read these all out,—this loan of \$100.00; W. J. and Nancy Roos a loan of \$300.00; J. R. ——— to the Sheenan Hardware, a loan of \$55.75. That was the list of loans made during the month, and you will find a copy of those entered on the regular discount register of the bank.

The Court: But I want to know what was read to the Board in connection with this minute.

A. This is the page, referring to the loans and discounts, Your Honor. Each month this list of loans made during the month were entered in this book by Mr. Lottridge, the cashier, or myself and presented to the Board of Directors at their monthly meeting and approved by them.

The Court: Now take a month in which some of these loans were made to the Salmon Lumber Company, some of those notes.

A. I have looked through here, and, as I have

explained, there isn't a note made to the Salmon Lumber Company on this book, because those were—

Mr. Whitcomb: Q. I wish to show by comparison of these respective exhibits to which I have called your attention, to this book and show whether the book contains them or not.

A. Just call those out and I can tell you.

Q. January, 1911, \$3000.00.

A. The number of the exhibits.

Q. 2616, Exhibit No. 12.

A. No, it isn't on the book.

The Court: May I ask right there why it wasn't in this list that was read to the Board?

A. Because, Your Honor, they weren't put on there, because they were loans created by overdrafts and the loan was already done, and the note was made during the month and took the place of the overdraft, and it wasn't a specific loan, as we termed it, made to some one, and they weren't registered on this book. Exhibit No. 10, being a note given to the First National Bank on November 2nd, 1910, numbered 2475 for the sum of \$3500.00, does not appear on the discount register. Neither does Plaintiff's Exhibit No. 27, being a note given by the Salmon Lumber Company, for the sum of \$3500.00, No. 2140. Plaintiff's Exhibit No. 11, dated December 10th, 1910, for \$6000.00, No. 2551 does not appear upon the discount register nor Plaintiff's Exhibit No. 9 for \$2500.00, the number of the note being 2191. The Board of Directors at their monthly meet-

ing or at any meeting which they had did not acquire any knowledge of the existence of these notes. Plaintiff's Exhibits No. 15 and No. 28, being notes given by Harry Brown to the First National Bank of Salmon, dated January 2, 1911, one for the sum of \$6500.00, the other for \$6250.00 don't appear on the discount register. The notes were given to cover Brown's overdraft at different times. The individual deposit ledger would show. I gave Mr. Brown credit in the matter of overdrafts because he was doing business thirty or forty miles from town and he couldn't get in very often and he had got a contract there with the Salmon Lumber Company for the output of his mill, and I know that part of that money was furnished to pay for the two million feet of lumber that he contracted for to the Government. Then when he was working up at the mill he made his pay roll by just drawing checks on the First National Bank of Salmon, and they were in due course honored by Mr. Lottridge, cashier, or by me. We were the only two acting officers at the counter at that time. And that is how the indebtedness was created, but we didn't make any specific loan to him to begin with. I acted entirely on my own initiative and not by reason of the advice or consent of the board of directors, and that is true in relation to the overdrafts of the Salmon Lumber Company. The reason I had to believe that those notes would be paid by Mr. Brown was that Mr. Brown was making a profit, or I thought he was making a profit on every thousand feet of lumber that he sawed up there in

the mill, and eventually those notes would be paid in full. He bought the timber of the Government, and he had one of the best locations for a mill in Lemhi County, right up Lick Creek, in a big body of pine timber. He had an elegant mill, two large boilers, 40 and 60 horse-power boilers, and they say it was the finest mill in Lemhi County. And had the bottom not dropped out of building operations there in Salmon, and the closing of the bank, I haven't any doubt but what they would all have been paid up, the Lumber Company and Brown, and those debts would have been paid in full. And I do know that Hal Brown had a lot of lumber stored on the North Fork that was hauled to town and put on a certain lot there, and it amount to, I think, in the neighborhood of somewhere near two hundred thousand feet. At the time these overdrafts were allowed and paid by the bank, common lumber, that is, regular common board lumber, was selling at \$20.00 a thousand; I know that. The surface lumber or clear lumber, whatever it might be, varied in price all the way from \$20.00 to \$50.00. Brown had more clear lumber than any mill in the county, and that clear lumber was sold for \$30.00. Plaintiff's Exhibit Nos. 15 and 28, respectively, dated January 2, 1911, one for the sum of \$6500.00 and one for \$6250.00, and numbered 2595 and 2592, respectively, do not appear upon the directors' discount register. I don't remember whether I ever consulted the Board of Directors about receiving these notes for overdrafts allowed Mr. Brown. Plaintiff's Ex-

hibit No. 14, being a note given by the Pollards for the sum of \$6250.00, dated June 29, 1910, and numbered 2460, does not appear upon the discount register. The reason it didn't appear is that it is in the same category as the other notes,—they were overdrafts; they were just given to cover an overdraft. Plaintiff's Exhibit No. 13, the \$1700.00 note given by the Pollards, numbered 2459, does not appear upon the directors' discount register. I stated that the Pollard note for the sum of \$6250.00, Plaintiff's Exhibit No. 14, was given for other notes, that is, it represented an accumulation of notes.

Q. These other notes for which it was given, if they were for direct loans, would they appear upon that discount register?

A. If they were a direct loan and not to replace an overdraft, it would appear on this record—direct loans would. Renewal of a note wouldn't appear on the register. I don't remember of ever having counselled with the Board of Directors at any of its meetings with regard to these particular loans in the matter of overdrafts. Concerning the closing of the bank there are so many things that enter into that that it would take quite a little while to answer that question.

Q. State it briefly.

A. But in reality the bank was very prosperous and improving in its business connections up to the time that a certain suit was brought against me, a civil suit, by one Lamborn and Richards, in which

the papers, especially the Boise papers, gave me a great deal of notoriety, with regard to a certain suit having been brought against H. G. King, the president of the First National Bank of Salmon, and that was extensively used by my opponents there in Salmon, in advertising that Mr. King, as president of the First National Bank, had been sued for a large amount of money, and I noticed from that time that our business began to fall off, our deposits began to go down. On top of that we had quite a boom in real estate, and people got a little excited, and we extended credits to people that couldn't, at the time we needed the money the most, owing to the reaction that had come about in the advent of the railroad at that time, they were unable to meet their obligations. In the meantime I couldn't call in my notes hardly fast enough to pay off the depositors; deposits were going down, and it necessitated me making loans from bankers in the east, in the shape of re-discounts. The first statement that was issued, showing that the First National Bank was borrowing any money, that was utilized very strongly against me by one bank in town anyhow, and I know from personal knowledge that he started the rumor that the First National Bank was hard up, and was borrowing money. The records will show that within a very limited length of time the deposits decreased, of that little institution in that small town, some quarter of a million dollars, showed a decrease of \$250,000.00 within a very limited time.

Q. That is, withdrawals?

A. Withdrawals. And I met all those withdrawals, and still kept above water, and, I don't want to say it egotistically, we struggled as hard as any man ever could to save that institution, and three days before the notice was put upon the door, Mr. Harry Yeager, the national bank examiner, came in on his trip there to examine the bank, and at that time we were getting very closely run; rumors were flying very fast and furious all over town, and the other banks were taking advantage of it, and it was only a question of time, in my mind, but what we would have to close the doors, provided we couldn't get some relief. And so I told Mr. Yeager. And he examined the papers, examined the institution, and went over the papers of the bank, and he said, "Mr. King," he said, "I can't close you; I can't close your doors." He says, "You are not insolvent, but," he said, "if you want to go into voluntary liquidation and stop doing business, then," he says, "that is up to the Board of Directors; but I can't take the initiative, only on condition that I consider you are insolvent." And he wouldn't, and we consulted him a little further. I called in the Board of Directors, and really upon his advice,—he said, "The only thing you can do, if you want to close,—I can't close you, but you can go into voluntary liquidation and close your doors tomorrow morning,"—and that is what we did. A conversation occurred between Mr. Yeager and myself and others about disposing of the property so that everything would be paid in full. Mr. Yeager was immediately put in charge of the bank, as soon as that notice was on there. He was there, and

naturally, representing the Government, he took charge of it. A proposition was made by G. B. Quarles, the president of the Citizens National Bank, to take over the deposits of the bank, or rather to pay off the depositors and take over the assets of the bank, pay the depositors in full, issue a notice to that effect, that they would pay the depositors in full, and at the end of a year, if there were any of the assets left, they were turned over to them, after taking out a reasonable compensation for the same, they would turn them over to the stockholders. The reason why that policy wasn't carried out was, I think—I am pretty sure, that Mr. Yeager turned that proposition down. The Citizens National Bank offered to do that.

I remember Defendant's Exhibit No. 1. At the time the bank failed, at the time Mr. Yeager was there making an examination, he called my attention to the indebtedness of the Salmon Lumber Company, and he and I went over to see C. D. Slaughter, the manager. I went with Mr. Yeager, and we went over for the purpose of making an inventory and getting out a financial statement of their condition, and they worked day and night in order to get this out, and this was the result, as prepared by C. D. Slaughter and certified to by Mr. Yeager. To verify that, Mr. Yeager writes out the certificate in his own handwriting: "I hereby certify that the above and foregoing is a true and correct statement of the affairs of the Salmon Lumber Company this 13th day of June, 1911,"—and he swore Mr. Slaughter to that. Mr. Yeager made this inventory. He went over there with Mr. Slaughter and stayed over there,

and when he brought this back he and I talked the matter over, and he said, "They have got \$36,000.00, nearly \$37,000.00, worth of assets over there," and I went over it with Mr. Slaughter, and I know it, and they are perfectly solvent. The only thing that I remember, when Mr. Yeager found out the amount of merchandise they had on hand, he insisted that they take out more insurance and all the insurance was assigned to the First National Bank of Salmon.

Defendant's Exhibit 1 was here offered in evidence for the purpose of showing the amount of property which the Lumber Company had on hand, and as showing the good faith of the First National Bank in paying these overdrafts, thinking that the company had sufficient funds behind it to meet them.

DEFENDANT'S EXHIBIT NO. 1.

F. W. Carl, Pres.

C. D. Slaughter, Mgr.

SALMON LUMBER COMPANY, LTD.

Dealers in all kinds of Lumber.

Shingles, Lath, Moulding, Doors, Windows, Finishing Lumber, Lime, Hay and Grain and Builders' Hardware.

Salmon, Idaho, June 13, 1911.

Sold to M. Accounts Payable.

12 per cent interest will be charged on all bills not paid in 30 days.

No.		No.	
Date.	Pcs. Description.	Ft. Price.	Amt. Total.
	Hal Brown Mill		\$ 411.03
	Authur Collins		570.93
	Dant. Russell		731.93

Morrison Merrell & Co.	283.26
Norvell Shaplight Hdw. Co. due 7-11-11	43.70
Dan Ross	3.40
Radfords Sash & Door Co.	47.21
Salmon National Forest	14.57
Doc. Witwell	2.25
	<hr/>
	\$2108.28

DEFENDANT'S EXHIBIT NO. 1—2.

F. W. Carl, Pres. C. D. Slaughter, Mgr.

SALMON LUMBER COMPANY, LTD.

Dealers in all kinds of Lumber.

Shingles, Lath, Moulding, Doors, Windows, Finish-
ing Lumber, Lime, Hay and Grain and
Builders' Hardware.

Salmon, Idaho, June 13, 1911.

Sold to M. Accounts Receivable.

12 per cent interest will be charged on all bills
not paid in 30 days.

No.	No.		
Date.	Pcs.	Description.	Ft. Price. Amt. Total.
		Frank Alerton	\$.65
		Clark Alby	21.75
		Jack Bunday	.45
		W. J. Brown	97.67
		Alex Barricks	33.37
		A. E. Burkhart	19.84
		Mrs. G. W. Benjamin	39.56
		Martin Borrovac	325.98
		W. B. Barton	41.60

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John Brumba	1.50
John Bolander	4.00
Autom Christianson	24.35
Wm. Clayton	401.78
G. B. Chapman	15.93
A. C. Cherry	20.15
Citizens National Bank	188.79
Homer Chaffee	3.50
C. & Stsitson	6.75
Carl Clark	8.25
Joe Davelt	5.45
Jas. Deatly	6.55
F. M. Dean	427.65
Z. W. Ellis	30.05
Episcopal Church	6.50
First National Bank,	
Deposit money in bank	378.05
W. B. Fowler	41.83
Fred Frey	.65
A. E. Anrgesson	66.50
First National Bank	1.00
Eli Groilet	340.48
F. G. Havemann	40.00
W. M. Hart	37.68
Doc. Hudkins	55.55
Ed Hins	22.75
Chas. Haman	5.45
Foney Jackavoc	18.61
Kirrgam & Bradshaw	28.50
Frank Kirtley	29.17
	<hr/>
	\$2798.29

DEFENDANT'S EXHIBIT NO. 1—3.

F. W. Carl, Pres.

C. D. Slaughter, Mgr.

SALMON LUMBER COMPANY, LTD.

Dealers in all kinds of Lumber.

Shingles, Lath, Moulding, Doors, Windows, Finish-
ing Lumber, Lime, Hay and Grain and

Builders' Hardware.

Salmon, Idaho, June 13, 1911.

Sold to M. Accounts Receivable.

12 per cent interest will be charged on all bills
not paid in 30 days.

No.	No.		
Date.	Pcs.	Description.	Ft. Price. Amt. Total.
		Amount Brought Forward	\$2798.29
		Lemhi County	5.92
		John Lotirage	476.27
		Lusburg Mining Co.	69.45
		E. C. Louis	61.85
		Joe La Munyan	77.05
		Leadore State Bank	11.10
		J. D. Lee	12.45
		Lemhi Land & Irr. Co.	2.00
		M. C. Lambeth	9.00
		W. J. Morgan	56.60
		Mitchell & La Munyan Bros.	671.01
		Mrs. Al Mathews	10.77
		John Manfull	1.60
		J. P. Maxfield	26.80
		G. A. Murphy	108.14
		Methodist	5.11
		Wm. Mulkey	29.63
		A. Mogg	23.70

Mrs. Mahoney	335.15
K. H. Morse	40.15
Jas. Mitchell	36.67
F. C. Miller	.35
Frank McAlpin	323.61
John McCracken	15.25
K. A. McKay	48.65
M. G. McClay	10.20
J. E. Woddings	24.45
I. N. Overtuff	45.03
W. H. O'Brian	36.67
John Osburn	10.50
P. M. Co.	16.60
Thos. Pope	14.41
Horace Pope	25.64
A. W. Patterson	13.85
Louis Petter	9.42
G. H. Perry	20.90
Bos Piguon	3.30
Frank Rittenhouse	41.40
	<hr/>
	\$5528.94

DEFENDANT'S EXHIBIT NO. 1—4.

F. W. Carl, Pres. C. D. Slaughter, Mgr.

SALMON LUMBER COMPANY, LTD.

Dealers in all kinds of Lumber.

Shingles, Lath, Moulding, Doors, Windows, Finishing Lumber, Lime, Hay and Grain and

Builders' Hardware.

Salmon, Idaho, June 13, 1911.

Sold to M. Accounts Receivable.

12 per cent interest will be charged on all bills not paid in 30 days.

No.	No.		
Date.	Pcs.	Description.	Ft. Price. Amt. Total.
		Amount Brought Forward	\$5528.94
		Reynolds & Hoffman	28.14
		W. W. Schultz	11.20
		L. A. Spooner	.75
		B. W. Seiner	15.93
		H. F. Soul	25.00
		Mrs. Seiner	10.09
		A. A. Smith	55.00
		Dick Spillman	188.74
		School District No. 1	.85
		F. A. Slegslsmith	49.60
		Herman Stroll	3.50
		Geo. Snyder	21.15
		Salmon Creamery	2.65
		Ferrell Tiny	13.19
		F. M. Tingley	4.75
		Tinday Cattle Co., Ltd.	157.00
		Vogler Plumbing Co.	.35
		Harry White	116.00
		Al Wartman	18.80
		W. J. Wittenburg	72.44
		Geo. Wilson	74.71
		G. C. Williams	5.45
		Henry Williams	3.00
		Fred Williams	25.00
		J. A. Wood	16.15
		Robt. Wilson	17.92
		J. R. Wheeler	4.00
		Yuba Construction Co.	52.50
			<hr/> \$6522.85

DEFENDANT'S EXHIBIT NO. 1—5.

F. W. Carl, Pres.

C. D. Slaughter, Mgr.

SALMON LUMBER COMPANY, LTD.

Dealers in all kinds of Lumber.

Shingles, Lath, Moulding, Doors, Windows, Finish-
ing Lumber, Lime, Hay and Grain and
Builders' Hardware.

Salmon, Idaho,191...

Sold to M.

12 per cent interest will be charged on all bills
not paid in 30 days.

No.	No.		
Date.	Pcs.	Description.	Ft. Price. Amt. Total.
		Cash in till	\$ 35.15
		Mdse.	25683.12
		Plant account	1236.83
		Bldg. account	1689.55
		Expense account	1650.74
		Bills Receivable	90.10
		Accounts Receivable	6522.80
			<hr/> \$36908.28
		Capital Stock and Surplus	\$10000.00
		Bills Payable	24800.00
		Accounts Payable	2108.28
			<hr/> \$36809.28

I hereby certify that the above and foregoing is a
true and correct statement of the affairs of the Sal-
mon Lumber Company, this 13th day of June, 1911.

SALMON LUMBER COMPANY, LTD.,

C. D. Slaughter, Sec. and Treas.

Personally: C. D. SLAUGHTER.

Endorsed: Filed March 9, 1915.

A. L. Richardson, Clerk.

Mr. Budge: This doesn't show the amount of property the Salmon Lumber Company had at the time the overdrafts were made at all. This inventory is dated the 13th day of June, 1911, after the close of the bank. It can't possibly go to the good faith of their making the loans in 1910.

Mr. Whitcomb: It is perfectly in harmony with the testimony which Mr. King and the others have—

The Court: Overruled. It has a tendency to show the value of the assets of this company, and the value of the assets would have some bearing upon the general question of the good faith of the bank in making the loans. Of course, if counsel for the plaintiff is right, that the making of an overdraft or permitting the making of an overdraft in itself constitutes actionable negligence, then this would be unimportant; but I understand you attempt to go further in the proof and show that, aside from that, it was negligence to make a loan to this company. In other words, if a loan had been made by way of a note, and no overdraft had been permitted at all, it would have been negligence to do so.

Mr. Budge: Yes.

The Court: Now this inventory, if correct, would tend to show that the company had considerable assets, and was solvent, and if it was solvent of course it would be quite a different thing from a case where it was insolvent.

Mr. Budge: But the offer was made, as I understood Mr. Whitcomb, to show that these overdrafts were allowed in good faith, while the inventory pur-

ports to show the condition in 1911. So far as the evidence is concerned, we don't know that they had one foot of lumber in Salmon when these overdrafts were made. There isn't any evidence to that effect, so far as that inventory is concerned. That shows the condition after the bank closed altogether, so that they might have been utterly negligent in making the loans and allowing the overdrafts, when they were made, notwithstanding this inventory.

The Court: That may be true, Mr. Budge, but if they had these assets at this time, some sort of inference or conclusion would be drawn, no doubt, that they had assets of a similar value before that, or approximately that value, although they might have been in a different form, or that it had been a prosperous company.

Mr. Budge: I want to incorporate in my objection that it is incompetent, and hasn't been properly identified, and it isn't shown that this witness made the inventory, or was competent to make it.

The Court: The objection is overruled.

Mr. Budge: An exception.

Q. Mr. King, do you know the reason for the depression, as you have spoken of it, in Salmon, shortly before this bank failed?

A. It is a well known fact that the depression in all values of real estate fell soon after the advent of the railroad, and continued so to do up to the time of the closing of the bank. A great many building operations were suspended, and building that took place in 1910, I know from the fact that there were

scores of houses built in Salmon in 1910—the fact of it is that the bottom fell out of the community, in a sense, in that section of the country, and it has been very much depressed ever since. We naturally expected the railroad to go on down the river, from the fact that they bought thousands of dollars worth of property on the other side of the river. They paid \$15,000.00 to one man for a piece of property. Everyone expected, and the presumption was, that they were going down the river, and they gave it out that they were going down the river. They surveyed the route, and thousands of dollars were spent on that survey. I made the disbursements for the railroad company myself, through the bank, on that survey.

Cross-examination by Mr. Budge:

It is correct that none of the notes which have been introduced in evidence, and signed by the Pollards, the Salmon Lumber Company and by Brown were ever listed in the Directors' Discount Register. Even after the overdrafts were represented by notes which I had taken, they were not listed in the Directors' Discount Register. I may state in that connection that a renewal wouldn't be listed. None of these notes were listed. So far as the list of notes was concerned that was read to the directors at their meetings, I never at any time read these notes to the directors, to my knowledge, or informed them of the possession of these notes by me on behalf of the bank. Mr. Andrews, the defendant, was drawing a salary from the bank at one time. I think he drew a salary

for a year. It was during the year 1910 that he drew his salary. In the month of July, at the meeting of July 6th, 1910, there were present, as shown by the directors' minutes, H. G. King, N. I. Andrews, George Buck, Fred Havemann and J. C. Sinclair and the following appears from the record: "The following report of the condition of the bank was read and adopted." That is the statement and the statement shows there an aggregate of overdrafts of \$17,138.85. So that the directors, including Mr. Andrews, understood at that time that there were overdrafts in that amount and the overdrafts which were then outstanding that had been allowed to the Salmon Lumber Company and Brown and the Polards on that date were known to the directors, among the aggregate amount of overdrafts. They weren't itemized in the report to the board there. It was just a copy of the trial balance statement, spread on the minutes, and approved, but showing the aggregate amount of loans, and amount of cash on hand, and all that.

Q. The overdrafts which were then outstanding in favor of these companies, or which had been allowed to these companies, were included in this statement which had been approved.

A. If there had been any overdrafts against them in that particular month, yes is the answer.

Q. Well, as a matter of fact, when these notes were executed which have been referred to in the evidence?

A. Yes, at those dates it would show overdrafts,

that is correct. Plaintiff's Exhibits 12, 10, 27 and 9 were all for overdrafts.

Q. So that the notes, Plaintiff's Exhibit 27, and Plaintiff's Exhibit 9, would be shown in the statement of overdrafts approved at the July meeting?

A. During this month, that is, during the month that these minutes are dated, those overdrafts would appear in that aggregate.

Q. And in this meeting on July 6th to which your attention has been called?

A. Every month.

Q. Just answer the question.

A. Yes. These notes were included in that statement of overdrafts which was approved on the 6th day of July, in the aggregate. Part of it was the Salmon Lumber Company. On January 4th, 1911, Plaintiff's Exhibit 12 was executed and is included in the general total here of overdrafts, on January 10th, 1911, the aggregate of which is \$28,657.91.

Q. And, without going into this matter more particularly, that is true as to all the other notes,—the Pollards and Brown, and the other Salmon Lumber Company notes, that wherever they were given for overdrafts they were included in the aggregate of overdrafts as shown by the statement approved by the board at the meeting next held after the overdraft was taken up by the note.

A. It would. The Salmon Lumber Company was a company which members of my family were interested in. I had no interest in it myself.

Q. Did you loan any money to your daughters or to your son-in-law to go into this business?

A. I did. I loaned \$2500.00, or rather Mrs. King, of her own money, loaned my daughter Alice \$2,500.00, and she put that into the lumber company. I loaned C. D. Slaughter an individual loan from the First National Bank of \$2500.00, the proceeds of which he put into the lumber company. C. D. Slaughter, I may say his note was liquidated—

Q. Never mind. Just what did you loan these parties?

A. That would be \$5000.00. We made them a present of \$2500.00, and then I loaned C. D. Slaughter \$2500.00.

Q. Was that all you loaned any of these individuals interested in the Salmon Lumber Company?

A. How do you mean—is that all I loaned them?—are you speaking of me as a banker or an individual?

Q. Of you as an individual.

A. I may have from time to time made them presents. I know I did at some times. I know I gave them money when they were married. I never loaned them money in their business. They had some money of their own, but I didn't loan them any more. C. D. Slaughter drafted the contract between the Salmon Lumber Company and Brown and the other mill owner, for the purpose of enabling the lumber company in which my family was interested to control the lumber market in that country. That was the object to be attained, to control the lumber industry in Sal-

mon at that time. It was not on that account that I carried this man Brown along and allowed him to overdraw. All these men had been doing business with me right along previously to that.

Q. Now you have stated that the loan for those notes for \$7500.00, taken over from the Langsdorf bank, signed by H. W. Soule and others, \$15,000.00, you have stated that those were loans taken over from the Langsdorf Company?

A. They were.

Q. Isn't it true that they were renewed by you, those two notes?

A. We did. They couldn't pay them; I had to renew them. We renewed them for the same amount, just as they stood when we took them from Langsdorf, and the entries which are made in the loan and discount register of loans to Soule and others are the renewal notes and not the original notes which were taken from Langsdorf. Both notes were signed by N. I. Andrews, as well as by the Soules.

Q. And Andrews at that time was indebted to the bank in other amounts, was he not?

A. Mr. Andrews always carried a balance to his credit in the bank.

Q. I am not asking you that.

A. No, directly he was not indebted to the bank. The Andrews Light & Power Company was indebted to the bank, and he was a stockholder. That was a corporation. I don't now whether he owned more stock than Mr. Soule or Mr. Myers; I don't know how many shares of stock he owned. There were

four of them in the company. The other one was F. D. Havemann.

I made trips to St. Anthony once or twice a year; perhaps sometimes I think I went—I know one year I was there twice, one year. I have a sister there. I have seen Mr. Bowerman on one or two occasions while there. I can't recall every instance that I saw Mr. Bowerman. Whenever I went to St. Anthony I naturally called on Mr. Bowerman.

Q. Were you up at St. Anthony during the fore part of 1910?

Mr. Millsaps: We would like to know what the object of this is, of this question.

The Court: Well, I think it is proper cross-examination.

Mr. Millsaps: We would like to know the purpose and raise an objection to it on the part of Mr. Bowerman. We have elected to stand on our motion to dismiss, and, as I understand it, that has eliminated him from any further consideration in this matter. Now, if the object of it is to prove anything as against Mr. Bowerman, we will object to it; if otherwise, we will not.

The Court: Perhaps that would depend on whether you claim any advantage by reason of the testimony that has gone in here through this witness, which would seem to be somewhat in your favor, namely, that when these notes and discounts were called to the attention of the board at their regular meetings, these particular notes in question were not listed, and hence not called to their attention.

Mr. Richards: We claim nothing, if the Court please, except to rest on the testimony as they introduced it in chief. We stopped right there, and are willing to rest our case on the case they made. There is no purpose to have any part of this, so far as Bowerman is concerned.

Mr. Millsaps: This morning we stated that we would stand upon our motion, and it was not our intention to introduce any more testimony. After that we had ourselves entered as associate attorneys—

The Court: I understand your position, Mr. Millsaps. It is unnecessary to re-state it, and of course if you do not claim any benefit by reason of the testimony which has been offered or may be offered, I will have to sustain the objection.

Mr. Millsaps: Our contention not only is that we do not claim it, but our understanding is that we cannot claim any; that is the view we took of it.

The Court: The Court has ruled with you, Mr. Millsaps. Go on.

As to all the other loans which were read off by Mr. Biscoe above the sum of \$6500.00 the loans were straight loans, instead of taking up overdrafts such as the McKinney loan and others. I remember personally making the W. S. Hammond loans myself, and I know that one was Wellington and one was William.

Q. But you have dittoed the name, just the same?

A. I don't think it is in my handwriting. Yes, it is in my handwriting. That is my handwriting;

I certainly did that. I want to call your attention to the fact that the "Mrs." shows very plainly that it was written in there afterwards, because it was Mr. A. Eckersall, and that should have been Mrs., and ditto was put in there at the time, naturally, when Mrs. Eckersall and Arch Eckersall—

Q. That book doesn't speak the truth in regard to that entry, does it?

A. Well, it does speak the truth—\$3000.00 and \$6000.00 to A. Eckersall, and then the top one here is Mrs., but, as I explained, the ditto is A. Eckersall, \$6000.00.

Q. It doesn't show that, does it?

A. That record doesn't. But this book does.

Mr. Andrews, the defendant, during the year 1910 was a member of the committee on loans and discounts. His duties, for which he was paid \$100.00 a month, were to help the other members of the board there in passing upon loans that were made by the bank that were called to his attention, and on several occasions I would get Mr. Andrews to go out and look at the security for some of these loans, so that I could have the benefit of his judgment. He was in and about the bank considerably. Mr. Andrews didn't inspect the books, as he was no bookkeeper. He would have to have some little knowledge of book-keeping, naturally, or he wouldn't know what he was inspecting. He had access to the books. I didn't inform him particularly, as vice-president and a member of the committee, of the general business of the bank. I talked over the loans with Mr. An-

draws, and discounts. I don't know about the overdrafts. Overdrafts were varying all the time, and there was no specific reason that we consulted. Sometimes a man would have an overdraft one day, and would have money on hand the next. They fluctuated so rapidly that I wouldn't know of any particular case where he was called upon to—where I was called upon to inform him or any of the others. Mr. Lottridge and I were the two active officers of the bank and conducting that part of it, and paying the checks over the counter; nobody else waited over the counter but us, and that is the only way an overdraft could be gotten. I don't know that I ever talked with Mr. Andrews about permitting an overdraft to be increased.

Q. Did Mr. Andrews discuss with you the overdrafts of \$17,000.00 or more? Did you and Mr. Andrews discuss that in July, 1910?

A. The discussion would only be in this way, that we would make a remark that the overdrafts in general had gone up so much this month, or that they had increased so much this month. I can't call any time to mind that Mr. Andrews asked me who was being permitted to overdraw or asked me specifically about the overdrafts. I don't recall him ever making any inquiry or indicating any interest in the increase of overdrafts. The overdrafts on July 6th, 1910, are shown to have been \$17,000.00 and some excess. On August 6th, 1910, the overdrafts show \$18,000.00, an increase of \$6000.00. In December, 1910, the overdrafts were \$23,805.00. January

10th, 1911, \$28,657.00. There never was any discussion between Mr. Andrews and myself with regard to the overdrafts, to my knowledge. No one of the board of directors ever made any inquiry with respect to that.

The Western Building & Loan took a mortgage on the property Pollard erected there with the brick. I certainly didn't intend to testify that I took a mortgage upon this property myself. The facts were that Mr. Pollard erected a brick building—I don't know who took the mortgage. I don't think it was I, and I don't think it was taken until after the bank failed. I believe it was taken by Mr. Yeager.

Re-direct examination by Mr. Whitcomb:

Q. Turn to page 139 of the minutes of your meetings, the meetings of your corporation. At the left hand side, on page 139, I see some initials, "C. S. L.," "11-19-09." What do they indicate, if you know?

A. They are the initials of C. S. Loveland, the bank examiner, at the time he examined the bank, and happened to examine the records of the minutes of the meeting.

On page 178 I find the initial of Mr. Loveland, the bank examiner, and on page 184 the initials of C. S. Loveland; on page 187 the initials of Harry Yeager, the other examiner, and the same on page 191. Always the minutes of the bank have been examined from time to time by the different bank examiners that came to Salmon. No criticism was ever offered. Mr. Loveland complimented Sinclair on the way the records of the bank were kept.

He was the secretary. He never made any objection to me of the showing made on any of these pages. The stockholders of the bank during this period were myself and Mr. Bowerman and Mr. Andrews and Mr. Buck and Mr. Havemann, Mr. Lottridge and Judge Olden. Judge Olden had \$1000.00 worth of stock. Guy E. Bowerman had \$10,000.00 worth of stock. Mr. Andrews had \$6600.00 worth of stock. George Buck had three thousand and some odd. Fred Havemann had \$1000.00. John Lottridge had \$1000.00. And I had \$14,000.00. And Sinclair, who is now deceased, \$9600.00.

The Court: I want to ask you how these overdrafts were reported to the board. Your attention has been called to an entry or entries in one of the books here, in which reference is made to the total amount of overdrafts existing at that time, or during the preceding month. How was that fact reported to the board, and what was the basis of this minute entry?

A. Taken from the trial balance statement.

The Court: I say, how was it reported? How did they come before the board?

A. It would come by the secretary of the board reading over the trial balance statement as it is spread on the minutes. It would come before the board just as it is spread on the minutes there.

The Court: You mean a memorandum in writing would be presented to the board, and that would be copied on the minutes, just as it appears here?

A. Yes, it would be copied just as it appears here.

The Court: How did it come that you permitted

overdrafts, when the by-laws seem to prohibit overdrafts?

A. It has always been customary in all national banks to permit overdrafts, Your Honor, and I have been in the banking business for quite a long time, and I never knew of a bank in the United States that did not permit overdrafts, and I think that by referring to any statement of any of the largest and most important banks in the United States you can hardly find one where overdrafts are not part of the assets of the institution.

The Court: That may be true, but how do you explain the existence of this by-law, and also the practice of permitting overdrafts?

A. That by-law was simply a copy of the by-laws of some other national bank, Your Honor, which is customary for nearly all national banks to have. It really wasn't made from our own initiative. It was simply a copy of some other bank's by-laws, and was passed in that way.

The Court: Was the matter never discussed at your board meetings, when these overdrafts were reported, that the permitting of overdrafts was in violation of the by-laws?

A. Not at all, Your Honor. The only way they were discussed was to make a remark that the overdrafts have gone down this month. We tried to keep them down as much as possible, but anyone in the banking business can verify the statement that it is the hardest thing in the world for a banker to keep down his overdrafts. They will crop in. When a check comes in you have either got to throw it out

or pay it, and it would work a detriment to the party, and it would injure your own business, if you throw them out, and you feel at the time that there is no question but what they will be paid in the future; and we were in the habit of letting people overdraw their accounts, sometimes, when they were starting out to buy a bunch of cattle, maybe, not knowing how much they would want.

The Court: What I want to ask you more particularly is about these three or four accounts, the more important ones, the Pollard matter, and the Salmon Lumber Company, and the Brown matter. I think you explained that these notes were given to take up accumulated overdrafts from time to time?

A. Yes, Your Honor.

Q. Were these overdrafts permitted without a previous arrangement, or in accordance with a previous arrangement?

A. Just between myself and the parties. I told them that if they would just draw their checks on us I would honor them.

Q. That was done before they drew the checks, or afterwards?

A. Done before they drew the checks; but I never anticipated that the thing would reach the proportions that it eventually did. But I got hold of it, and I sort of had to hold it up, but it got so large—I wasn't anticipating to advance them this money and let them draw on us for it. They couldn't tell how much lumber was coming in, and they couldn't tell how much money they would want to use. I let

them draw on the bank, and at the end of the month they would come in and cover it with a note, and I gave them the privilege of overdrawing their account, and that is customary in a great many banks.

The Court: I think that is all. Do you desire to ask any more questions, either side?

Mr. Budge: No, Your Honor. I desire to submit these four pages.

The Court: Have you submitted them to counsel?

Mr. Budge: Yes.

Mr. Richards: We would like to have them considered denied, so as to make the issue.

The Court: Very well.

An adjournment was thereupon taken until 1:30 P. M.

Defendants' Exhibit No. 2 was here offered and received in evidence. By order of Court, permission was granted for the withdrawal of plaintiff's Exhibit 26, which is an exact copy of plaintiff's Exhibit 25, save and except that plaintiff's exhibit 26 is signed by C. D. Slaughter and A. K. Carl. The defendants rested, there was no rebuttal and the testimony was closed.

Plaintiff tenders the foregoing and prays that it be allowed as a statement of evidence under equity rule 75.

Dated this 26th day of October, 1915.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,
Attorneys for Plaintiff.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

ORDER APPROVING STATEMENT OF EVIDENCE.

The foregoing statement of evidence being tendered to me for settlement and allowance and it appearing to me that said statement was lodged in due time with the Clerk of this Court and notice of such lodgment and of the time of the proposed settlement appearing to have been given to all parties by their counsel; and it further appearing that more than ten days has elapsed since the notification of solicitors for defendants of the lodgment of said statement and of the time and place when plaintiff would apply to the Court or the Judge thereof to approve said statement; and it further appearing that said statement is in all respects true and correct and contains a full transcript of the evidence reduced to narrative form pertaining to the issues in said cause upon which the decree entered herein on the 29th day of June, 1915, is based;

It Is Ordered, That said statement be, and the

364 *Frank R. McCormick, Receiver, etc., vs.*

same hereby is approved for use on appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit.

Dated December 1st, 1915.

FRANK S. DIETRICH,
U. S. District Judge.

Lodged October 27, 1915.

Endorsed: Filed December 1, 1915.

W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

PETITION FOR APPEAL.

*To the Honorable Frank S. Dietrich, United States
District Judge for the District of Idaho:*

The above-named plaintiff, Frank R. McCormick, as Receiver of the First National Bank of Salmon, a corporation, conceiving himself aggrieved by the order and decree made and entered in the above-entitled cause on the 29th day of June, 1915, wherein and whereby, among other things, it was and is

ordered, adjudged and decreed that the plaintiff do have and recover of and from the above-named defendants, Harry G. King and Norman I. Andrews, the sum of Fourteen Thousand Seven Hundred Dollars (\$14,700.00), and wherein and whereby it was further adjudged and decreed that the plaintiff take nothing by reason of his complaint against the above-named defendant, Guy E. Bowerman, and that as to said Guy E. Bowerman, plaintiff's bill of complaint herein be dismissed, by direction of and pursuant to authority from the Comptroller of the Currency, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from said order and decree, for the reasons set forth in his assignment of errors which is filed herewith; and said plaintiff prays that this, his petition for said appeal, may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 1st day of December, 1915.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,

Attorneys and Solicitors for Plaintiff,
Residence and P. O. Address: Pocatello, Idaho.
Endorsed: Filed December 1, 1915.

W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

ASSIGNMENT OF ERRORS.

Comes now the plaintiff and files the following assignment of errors upon which he will rely upon his appeal from the decree made by this Honorable Court on the 29th day of June, 1915, in the above-entitled cause:

I.

That said decree is erroneous wherein it adjudges and decrees that the defendants, Harry G. King and Norman I. Andrews, are each liable for, and that plaintiff have and recover of and from said Harry G. King and Norman I. Andrews, and each of them, the sum of \$14,700.00 only, the said decree in this respect being necessarily based upon the finding and conclusion of the Court that the extent of the liability of said defendants, having in view the nature of their wrongdoing, as shown by the evidence, is measured and limited by Sections 5147, 5200 and 5239, Revised Statutes of the United States, and that the said defendants are not liable at common law for

the entire loss resulting from their said wrongful conduct.

II.

That said decree is erroneous wherein it adjudges and decrees that the plaintiff take nothing by reason of his complaint against the said defendant, Guy E. Bowerman, and that as to the said defendant, Bowerman, the plaintiff's bill of complaint be dismissed, the said decree being in this respect necessarily based upon the finding and conclusion that the said Bowerman was not guilty of such neglect of duty as a director of said First National Bank of Salmon as to render him liable either under Sections 5147, 5200 and 5239, Revised Statutes of the United States, or at common law, notwithstanding the fact that the uncontradicted evidence shows: That the said Bowerman was a duly elected and qualified director of said bank from the time of its organization in 1906 up to the time of the failure of said bank on the 8th day of June, 1911; that the by-laws of said bank in force during said period, among other things, provide:

"Section 16. The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order.

"The Board may also hold special meetings upon the call of the President, Cashier or any three or more members, etc.

“Section 19. No officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order.

* * * * *

“Section 29. There shall be appointed by the Board of Directors a committee of three members whose duty it shall be to examine each month the affairs of this bank, to count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith and whether the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter.

* * * * *

“Section 34. The Board of Directors of the bank shall at each monthly meeting, or oftener, examine and approve all loans and discounts and such approval shall be recorded in a book kept for that purpose.”

And notwithstanding the fact that the uncontradicted evidence further shows that without regard to said provisions of said by-laws and the provisions of the laws of the United States prescribing his obligations and duties as a director of said national banking association, the said defendant, Guy E.

Bowerman, failed to attend any regular or special meeting of the board of directors during the entire period between the date of the organization of said bank and the date it closed its doors, to-wit: the 8th day of June, 1911, and failed, as such director, to exercise any supervisory or other control over the officers or clerks of said bank, or to inspect or examine the loans, discounts and records of said bank monthly or at all; that during said entire period the said officers and clerks of said bank were paying checks and orders drawn by numerous persons, who, at the time of the presentation of such checks and orders, had on deposit no funds with which to meet such checks and orders; that the examining committee of said bank was not reporting to the board of directors as required by the by-laws; that said bank was, during the year 1910 and 1911, being grossly mismanaged to such an extent that it was compelled to suspend business on the said 8th day of June, 1911, and notwithstanding the further fact, as shown by the evidence, that the said Bowerman, during practically the entire period of said mismanagement, had knowledge that said bank was being grossly mismanaged.

III.

That, by reason of the uncontradicted evidence as recited in the foregoing assignment No. 2, the Court erred in failing and refusing to adjudge and decree that the said defendant Bowerman is liable at common law for all damages sustained in consequence of his negligent conduct, which damages, as shown

by the evidence, amount to Thirty Thousand Three Hundred Seventy-nine and 85-100 Dollars (\$30,-379.85.).

IV.

In order that the foregoing assignments of error may be and appear of record, plaintiff presents the same to the Court and prays that such disposition be made thereof as may be in accordance with law and the statutes of the United States in such cases made and provided, and plaintiff prays a reversal of said decree made and entered by said Court.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,

Attorneys and Solicitors for Plaintiff,

Residence and P. O. Address, Pocatello, Idaho.

Endorsed: Assignment of Errors filed with Petition for Appeal. Filed Dec. 1, 1915.

W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

ORDER ALLOWING APPEAL.

Upon motion of J. M. Stevens, Esquire, and Budge & Barnard, attorneys and solicitors for the plaintiff, *It Is Ordered* that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore filed and entered herein on the 29th day of June, 1915, be, and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals. By reason of the fact that said appeal is taken pursuant to direction of the Comptroller of the Currency, no bond or undertaking on appeal is required.

Dated this 1st day of December, 1915.

FRANK S. DIETRICH,

*Judge of the United States District Court for
the District of Idaho.*

Endorsed: Filed Dec. 1, 1915.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,

Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

ORDER FOR THE TRANSMISSION OF EXHIBITS.

It appearing to the Court that it is necessary and proper that the original exhibits introduced in the above-entitled cause be inspected and considered upon the appeal of said cause,

It Is Hereby Ordered, That the Clerk of this Court transmit by registered mail to the Clerk of the Circuit Court of Appeals at San Francisco, California, Plaintiff's Exhibit 23, Defendant's Exhibit 2, and Plaintiff's Exhibits 6, 7, 8, 29, 30, 31, 32 and 33, the same being the Minute Book, Discount Register, Statement of Overdrafts and Published Notices of Meetings, and that within forty days after the final determination of said cause in the Circuit Court of Appeals the Clerk of said Court return the same by registered mail to the Clerk of this Court.

Dated this 1st day of December, 1915.

FRANK S. DIETRICH,
U. S. District Judge.

Endorsed: Filed Dec. 1, 1915.

W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

PRAECIPE.

To the Clerk of the above-entitled Court:

You are hereby requested to transmit in printed form to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the following portions of the record in said cause, to-wit:

1. Fourth Amended Bill of Complaint, particularly bearing in mind that at the trial of said cause four pages were substituted by permission of the Court for four pages of the bill as it appeared at the commencement of the trial. These four substituted pages should, of course, be included in lieu of the four original pages, and bearing in mind also that under permission of the Court during the trial the schedule of overdrafts which theretofore was attached to the second amended bill was detached therefrom and ordered attached to the fourth amended bill as a part thereof, and said schedule is therefore to be considered as a part of the said fourth amended bill.

2. Answer of defendant, Guy E. Bowerman.

3. Answer of defendants, King, Andrews and Edwards.

4. Notice of motion and motion to strike amendment to answer of defendant, Guy E. Bowerman, and affirmative defense of defendants, King, Andrews and Edwards.

5. The minutes of the Court showing the ruling and decision upon said motion to strike.

6. Statement of the evidence.

7. Decision of the Court (Opinion).

8. Decree.

9. Petition for Appeal.

10. Assignment of Errors.

11. Order Allowing Appeal.

12. Order for Transmission of Exhibits.

13. Citation.

14. This Praeceptum.

15. Pursuant to the order of the Court, you are also requested to transmit to the Clerk of the Circuit Court of Appeals with the printed record the following exhibits in the case: Plaintiff's Exhibits 6, 7, 8, 23, 29, 30, 31, 32, 33, and Defendants' Exhibit 2.

16. All exhibits other than those ordered to be transmitted and excepting also plaintiff's Exhibits 1 and 2 (which relate solely to the Langsdorf Bank deal, concerning which no question is raised on the appeal) you are requested to have set forth at length in the printed record at the respective places where it is shown by the statement of the evidence the said exhibits were admitted in evidence.

To save expense in transcribing from the records in your office, plaintiff hereby tenders copies of the above specified portions of the record, save and except the first five and the exhibits which said first

five portions and said exhibits it will be necessary for you to transcribe.

Dated this 1st day of December, 1915.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,
Attorneys for the Plaintiff.

Endorsed: Filed Dec. 1, 1915.

W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Plaintiff,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Defendants.*

CITATION.

The President of the United States to the above-named defendants, Harry G. King and Norman I. Andrews, and to E. W. Whitcomb, Esquire, their attorney, and to the above-named defendant, Guy E. Bowerman, and to Millsaps & Moon and Richards & Haga, his attorneys, *Greeting:*

You Are Hereby Cited and admonished to be and appear in the United States Circuit Court of Appeals

for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States, District of Idaho, Eastern Division, wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon, a Corporation, is plaintiff, and Harry G. King, Norman I. Andrews, George Buck, Guy E. Bowerman, B. F. Olden, Fred G. Havemann and John Lottridge are defendants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, Eastern Division, this 1st day of December, 1915.

FRANK S. DIETRICH,
*Judge of the United States
District Court for the Dis-
trict of Idaho, Eastern
Division.*

Due service of the within citation and receipt of copy thereof admitted this 6th day of December, 1915.

E. W. WHITCOMB,
*Attorney and Solicitor for
Appellees, Harry G. King
and Norman I. Andrews.*

Due service of the foregoing citation and receipt of copy thereof admitted this 1st day of December, 1915.

RICHARDS & HAGA,
Attorneys and Solicitors for
Appellee, Guy E. Bower-
man.

Endorsed: Filed Dec. 9th, 1915.

W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest: W. D. McREYNOLDS,
(Seal.) *Clerk.*

CLERK'S CERTIFICATE.

In the District Court of the United States for the
District of Idaho, Eastern Division.

FRANK R. McCORMICK, as Receiver of the First
National Bank of Salmon, a Corporation,
Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, B. F.
OLDEN, FRED G. HAVEMANN and JOHN
LOTTRIDGE, *Appellees.*

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 378, inclusive, contain true and correct copies of the Fourth Amended Bill of Complaint, Answer of Defendant Guy E. Bowerman, Answer of Defendants King, Andrews and Edwards, Notice of Motion and Motion to Strike Amendment to Answer of Defendant Guy E. Bowerman and Affirmative Defense of Defendants King, Andrews and Edwards, Minutes of the Court Showing the Ruling and Decision Upon Motion to Strike, Amendment to Answer of Defendant Guy E. Bowerman, Statement of the Evidence, Decision of the Court (Opinion), Decree, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Order for Transmission of Exhibits, Citation (original), Praecipe, Return to Record and Clerk's Certificate, which, together, constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$542.30, and that the same has been paid by the Appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 14th day of January, 1916.

(Seal.)

W. D. McREYNOLDS,

Clerk.

2

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK R. McCORMICK, AS RECEIVER OF THE
FIRST NATIONAL BANK OF SALMON,
A CORPORATION,
APPELLANT,
VS.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE
BUCK, GUY E. BOWERMAN, B. F. OLDEN,
FRED G. HAVEMANN AND JOHN
LOTTRIDGE,
APPELLEES.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, EASTERN DIVISION

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,

Attorneys for Appellant.

Filed
JUN 17 1919



UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

FRANK R. McCORMICK, AS RECEIVER OF THE
FIRST NATIONAL BANK OF SALMON,
A CORPORATION,
APPELLANT,
VS.

LARRY G. KING, NORMAN I. ANDREWS, GEORGE
BUCK, GUY E. BOWERMAN, B. F. OLDEN,
FRED G. HAVEMANN AND JOHN
LOTTRIDGE,
APPELLEES.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, EASTERN DIVISION

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,

Attorneys for Appellant.



STATEMENT OF THE CASE.

The First National Bank of Salmon, Idaho, was organized during the month of January, 1906. Continuously thereafter until the bank closed its doors on the 8th day of June, 1911, appellees were members of the board of directors and Appellee King was during said entire period except during the year 1908, President of the institution and in personal charge of its affairs.

On October 9, 1906, by-laws were adopted by the association which contained, among others, the following provisions:

“Section 16: The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order.”

“The Board may also hold special meetings upon the call of the President, Cashier, or any three or more members, etc.”

“Section 17. There shall be a committee, to be known as the loans committee, consisting of the President, one Director, and Cashier, who shall have power to make loans, discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the Board of Directors make a report of

all bills, notes, and other evidences of debt discounted and purchased by them for the bank since their last previous report.”

“Section 19. No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order, unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order.”

“Section 22. The Board of Directors shall have power to prescribe, and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank, and to prescribe the general or particular manner in which its affairs shall be conducted.”

“Section 29. There shall be appointed by the Board of Directors a committee of three members, whose duty it shall be to examine every month the affairs of this bank, to count its cash, and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter.”
(Pages 137-139).

Section 34 of said by-laws, at the request of the Comptroller, was amended on January 18, 1910, to read as follows:

“The board of directors of the bank shall at each monthly meeting or oftener, examine and approve all

loans and discounts and such approval shall be recorded in a book kept for that purpose.” (Pages 164, 165).

Up to the close of the year 1909, the bank was prosperous. It had increased its capital stock from \$25,000.00 to \$50,000.00 to enable it to better handle its volume of business and besides the dividends declared, \$15,000.00 had been carried to the surplus fund. It had, however, during that year, allowed a great many overdrafts and had made some excessive loans (p. 162). It had also purchased the assets of Langsdorf & Company, a rival institution, and had taken over numerous notes representing individual loans made by Langsdorf & Company, which though lawful for that bank, were far in excess of ten per cent of the capital and surplus of the said First National Bank. During the month of August, 1909, the Comptroller wrote a letter of remonstrance (p. 157), and the bank replied that some of the loans had been paid and the others would receive attention at maturity (p. 161), but as a matter of fact they were renewed (p. 353), and other excessive and improvident loans,—not renewals—were made.

During the year 1910 the practice of allowing overdrafts was continued and, as shown by the bank's minute record, plaintiff's Exhibit 23 (see also Tr. p. 357), the aggregate of overdrafts at times exceeded one-third the amount of the capital stock of the institution. As a result of this mismanagement and the inability of the bank to obtain payment of notes and accounts held by it, the Comptroller of the Currency directed plaintiff's predecessor to close the bank and take possession of its assets.

The improper loans above referred to included various amounts loaned from time to time to F. M. and S. A. Pollard, the Salmon Lumber Company, a corporation, in which a controlling interest was held by relatives of King, the President of the bank (pp. 175, 286), and to one Harry Brown, a sawmill owner, who, at the time, with other mill owners, was a party to a contract with said Salmon Lumber Company, the object of which was to control the lumber market in the Salmon country (p. 352).

When the bank closed on June 8, 1911, it held two notes of the Pollards, one for \$1700.00 and one for \$6250.00; two notes signed by Brown for \$6250.00, and \$6500.00 respectively, and four notes of the Salmon Lumber Company for \$2500.00, \$3500.00, \$6000.00, and \$3000.00, respectively, representing an indebtedness of \$15,000.00. All these loans were unsecured. There was also due the bank on June 8, 1911, the sum of \$9222.26 in overdrafts (p. 173).

Ascertaining that the amount collectible upon notes and overdrafts would be insufficient to discharge the liabilities, the Comptroller levied an assessment upon the stockholders (p. 181), and the receiver used every effort, including court proceedings (pp. 177-203-301), to make collection thereof and also collected all that it was possible to collect upon the overdrafts and the loans hereinbefore enumerated, but there remains unpaid of the bank's liabilities approximately \$45,000.00 (pp. 300, 313).

The amount due upon the particular loans above referred to at the date of the trial was as follows:

Salmon Lumber Company	\$13,629.20
Harry Brown	11,760.25
F. M. & S. A. Pollard	7,800.00

making a total of \$33,189.45, not including interest and \$47,459.30, with interest included (p. 217).

Judge Cowen, as assignee of the Salmon Lumber Company, testified that it is certain that not to exceed fifty per cent will be realized by creditors of that company (p. 276), so that the net loss on loans to that company will not be less than \$6814.60.

Execution was returned *nulla bona* in an action by the receiver against Harry Brown to collect his notes (p. 214), so that the entire \$11,760.25 is the loss sustained thereon.

Only \$150.00 was realized upon the loans to the Pollards (p. 314), who were clearly shown to be insolvent (p. 318), so that the loss upon said loans will not be less than \$7800.00.

The aggregate loss will, therefore, be not less than \$26,374.85, not including any interest, and \$40,644.70 with interest to the date of trial being included, and these totals are determined without taking into consideration attorney's fees and costs, included in the judgments which the receiver obtained against Brown and the Pollards.

The losses from the overdrafts are approximately \$3900 (pp. 216, 217).

During the entire period while the bank was being mismanaged, Appellee King was present at every meet-

ing of the stockholders and Board of Directors and Appellee Andrews was present at all such meetings with possibly one or two exceptions, King being President of the bank, as before stated, and Andrews Vice President and Chairman of the Committee on Loans and Discounts (Plaintiff's Exhibit 23); but as shown by said exhibit, Appellee Bowerman was not present at any meeting of stockholders or directors during the entire period from the organization of the bank until the date of its failure.

This action is brought to recover from said directors upon their statutory liability for knowingly permitting and assenting to the making of excessive loans in violation of Sections 5147, 5200 and 5239 of the Revised Statutes of the United States, and also to recover upon their common law liability for negligently and carelessly failing to properly manage and conduct the affairs of said bank and in carelessly and negligently allowing the same to be grossly mismanaged, whereby the assets thereof were wasted and lost. The court found against the Defendants King and Andrews, measuring their liability pursuant to the provisions of the Statute rather than under the common law, but found in favor of the Appellee Bowerman. This appeal is from the judgment.

ASSIGNMENT OF ERRORS.

I.

That said decree is erroneous wherein it adjudges and decrees that the defendants, Harry G. King and Nor-

man I. Andrews, are each liable for, and that plaintiff have and recover of and from said Harry G. King and Norman I. Andrews, and each of them, the sum of \$14,700.00 only, the said decree in this respect being necessarily based upon the finding and conclusion of the court that the extent of the liability of said defendants, having in view the nature of their wrongdoing, as shown by the evidence, is measured and limited by Sections 5147, 5200 and 5239, Revised Statutes of the United States, and that the said defendants are not liable at common law for the entire loss resulting from their said wrongful conduct.

II.

That said decree is erroneous wherein it adjudges and decrees that the plaintiff take nothing by reason of his complaint against the said defendant, Guy E. Bowerman, and that as to the said Defendant Bowerman, the plaintiff's bill of complaint be dismissed, the said decree being in this respect necessarily based upon the finding and conclusion that the said Bowerman was not guilty of such neglect of duty as a director of said First National Bank of Salmon as to render him liable either under Sections 5147, 5200 and 5239, Revised Statutes of the United States, or at common law, notwithstanding the fact that the uncontradicted evidence shows: That the said Bowerman was a duly elected and qualified director of said bank from the time of its organization in 1906 up to the time of the failure of said bank on the 8th day of June, 1911; that the by-laws of said bank in force during said period, among other things, provide:

“Section 16. The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order.

The Board may also hold special meetings upon the call of the President, Cashier or any three or more members, etc.”

“Section 19. No officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order.”

“Section 29. There shall be appointed by the Board of Directors a committee of three members whose duty it shall be to examine each month the affairs of this bank, to count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith and whether the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter.”

“Section 34. The Board of Directors of the bank shall at each monthly meeting, or oftener, examine and approve all loans and discounts and such ap-

proval shall be recorded in a book kept for that purpose.”

And notwithstanding the fact that the uncontradicted evidence further shows that without regard to said provisions of said by-laws and the provisions of the laws of the United States prescribing his obligations and duties as a director of said national banking association, the said defendant, Guy E. Bowerman, failed to attend any regular or special meeting of the board of directors during the entire period between the date of the organization of said bank and the date it closed its doors, to-wit: the 8th day of June, 1911, and failed, as such director, to exercise any supervisory or other control over the officers or clerks of said bank or to inspect or examine the loans, discounts and records of said bank monthly, or at all; that during said entire period the said officers and clerks of said bank were paying checks and orders drawn by numerous persons, who, at the time of the presentation of such checks and orders, had on deposit no funds with which to meet such checks and orders; that the examining committee of said bank was not reporting to the board of directors as required by the bylaws; that said bank was, during the years 1910 and 1911, being grossly mismanaged to such an extent that it was compelled to suspend business on the said 8th day of June, 1911, and notwithstanding the further fact, as shown by the evidence, that the said Bowerman, during practically the entire period of said mismanagement, had knowledge that said bank was being grossly mismanaged.

III.

That, by reason of the uncontradicted evidence as recited in the foregoing Assignment No. 2, the court erred in failing and refusing to adjudge and decree that the said Defendant Bowerman is liable at common law for all damages sustained in consequence of his negligent conduct, which damages, as shown by the evidence, amount to Thirty Thousand Three Hundred Seventy-nine and 85-100 Dollars (\$30,379.85).

ARGUMENT.

The question for determination is whether or not each of the appellees is liable at common law for the entire loss sustained by the bank (Assignments 1, 2 and 3), and in this connection let us inquire as to their common law duties and whether or not appellees neglected to perform them. One of the leading cases upon the subject and upon which great stress will undoubtedly be laid by appellees is *Briggs vs. Spaulding*, reported in 141 U. S., 132; 35 L. Ed., 562. Four of the justices dissent from the decision of the court relieving the directors from liability, but the decision as to facts, is not controlling here, nor when analyzed does it announce principles which interfere with the right of the plaintiff in this case to maintain his action. The defendants in the *Briggs-Spaulding* case had been directors but for a very short period and under the circumstances the court felt that they had not been in office for such a length of time as to charge them with familiarity with the bank's affairs. To quote:

“We are of the opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make an investigation and did not themselves individually conduct an examination during their short period of service; or because they did not happen to go among the clerks to look through the books or call for and run over the bills receivable.”

But the court, nevertheless declares, in the last paragraph of the opinion:

“Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of the bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they be permitted to be shielded from liability because of want of knowledge of wrongdoing if that ignorance is the result of gross inattention; but in this case, we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors, and it is really to that the case becomes reduced at last.”

This decision has been cited by almost every court which has been called upon to consider the question of the liability of bank directors, but in none of the cases has it ever been regarded by the courts as a justification for relieving from liability directors whose conduct

has been so grossly negligent and so flagrantly in violation of the statute and the by-laws of the association as has the conduct of the defendants in this case. In *Gibbons vs. Anderson*, 80 Fed., 345, the *Briggs-Spaulding* case is given careful attention by Judge Severens, and it is held that “the management of the bank is cast upon the Board of Directors.” And the court, after quoting the concluding declaration in the *Briggs-Spaulding* case, declares:

“In my opinion it does not meet the requirements of this statement of the law that directors may consign the management of the operations of the bank to a trusted officer, and then repose upon their confidence in his right conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply would be made by the official who has any reason for concealment. Again, what are the duties of management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of these, his duties are conjoint with those of the board of directors. In large affairs it

is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any sudden and unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correlative. One side are those of an executive nature, which relate mainly to the details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on middle ground, and where it may be difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and

that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it provided further for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state and to hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that these men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and

policy of the banking act that its vital interests should be committed to one man, without oversight or control.”

In Rankin versus Cooper, 149 Fed., 1010, it appeared from the evidence that the directors had left the management of the bank to a man by the name of Allis, and that Allis had so dissipated the bank's funds in various enterprises with which he was connected, that insolvency resulted. In that case also the Briggs-Spaulding case was interposed as a defense against any decree adverse to the defendants, but the court held against the construction placed upon that decision by the defendant's counsel. The case is really one passing squarely upon the common law liability of directors, and the court lays down certain principles by which it considers such liability is to be determined. The following is from the decision:

“At the threshold of this case it must be said that the testimony does not show that any of the defendants in this proceeding gained or intended to obtain any pecuniary advantage or to make any improper personal gain out of the various transactions involved. As far as the evidence shows, the defendants were men in good standing in the community, and many of them active business men of high standing. Nor does it appear that they were guilty of knowingly assenting to or participating in the malversations of funds by the president of the bank which wrecked this one-time flourishing financial institution. The question rather is whether they were guilty of neglect in not knowing or ascertaining these things and in not taking steps to prevent or remedy them—such culpable neglect as would

make them liable under the general principles of the common law governing the duties of bank directors which apply to national banks as well as all other banks, and also under Section 5145, Rev. St. (U. S. Comp. St., 1901, p. 3463)—the national bank law—which provides that the affairs of such banks shall be managed by not less than five directors, and Section 5147, which makes it incumbent on every such director to diligently administer the affairs of such banks.”

“Briefly summarized, I understand the law on this subject to be as follows: (1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinary prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then

a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business but they ought to have general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the conditions and resources of the bank to be made with reasonable frequency. I have drawn the foregoing propositions largely from the leading cases of *Briggs vs. Spaulding*, 141 U. S., 132, 11 Sup Ct., 924, 35 L. Ed., 662, *Gibbons vs. Anderson* (C. C.), 80 Fed., 345, *Martin vs. Webb*, 110 U. S., 7, 3 Sup Ct., 428, 28 L. Ed. 49, *Warner vs. Penoyer*, 91 Fed., 588, 33 C. C. A., 329, and the recent decision of the Supreme Court of Ohio in the case of *Mason vs. Moore*, 76 N. E., 932."

We also call attention to the case of *Allen vs. Luke*, 169 Fed., 1018, for a statement of the law with respect to the liability of directors, both under the statute and at common law, wherein the court holds that the statutory liability is not exclusive and does not relieve the directors from their common law duty to be honest and diligent in accordance with their oath. Bearing in mind the principles announced in the cases cited, let us examine the facts in this case.

The first real cause for trouble was the purchase of

the Langsdorf bank. Not in the purchase itself, but because of the fact that numerous heavy loans were taken over, among which were the following:

J. W. Moore	\$16,000.00
I. O. O. F. No. 5.....	16,000.00
W. J. Wettenberg	10,000.00
H. W. Soule et al.....	7,500.00
H. W. Soule et al.....	7,500.00

(Page 157).

The capital and surplus of the bank was \$65,000.00 (p. 222), and therefore each of these loans was excessive and when shown by the report to the Comptroller called forth a prompt direction by that official that they be reduced to the statutory limit (157).

In due time the Moore, Odd Fellows and Wettenberg notes were paid, but the Soule notes, which were also signed by Appellee Andrews (p. 353) were renewed. If the purchase of these obligations as part of the assets of the Langsdorf bank was not in violation of law and did not constitute carelessness it was certainly mismanagement and carelessness to renew the Soule loans for an amount in excess of the statutory limit, and especially is this true when the Andrews Light & Power Company in which Andrews and Soule were stockholders was at the time also indebted to the bank (353).

From the date of the purchase of the Langsdorf bank, Appellee King and one Lottridge, the executive officers of the bank, had a free hand. During 1910 Andrews drew a salary of \$100.00 per month as Vice President but apparently participated but little in the actual con-

duct of the bank's business. In direct violation of the by-laws overdrafts were allowed almost without restriction. In July, 1910, they amounted to \$17,138.85 (p. 350), (in excess of one-fourth of the capital and surplus); in December they had increased to \$23,805.00, and on January 10, 1911, they exceeded \$28,000.00 (pp. 357, 358). Plaintiff's Exhibit 23 shows that the board of directors had knowledge of this habitual and persistent violation of the by-laws and yet there was no effort to check the president and cashier or to interfere in any way to safeguard the bank's interests against probable loss. While it is true that when the bank was closed the overdrafts had decreased to \$9800.00, it was evidently on account of the fact that the necessities of the patrons of the bank immediately preceding that date had been less urgent rather than because of any action on the part of the directors to reduce the overdrafts. The loss in overdrafts was the result of long continued negligence and carelessness of, and utter disregard of duty by the directors. The trial court entertained the view that the by-law forbidding overdrafts was adopted inadvertently and that the general acquiescence in its violation should be enough to excuse the directors from liability. While Appellee King testified that the by-laws were a copy of the by-laws of some other national bank, there is no question about them having been properly adopted (pp. 135, 292), and that the directors by appointing a "loans and discount committee" (see Plaintiff's Exhibit 23), and by amending Section 34 at the request of the Comptroller (pp. 164, 165), recognized the by-laws as being in force. Furthermore, if the by-

law forbidding overdrafts was without effect or by lack of observance could become ineffective, the same is true as to all the by-laws. The result would be that while the first violation of a by-law might be reprehensible, repeated violations acquired virtue in proportion to the frequency of their commission and that creditors of the bank may not complain where they suffer loss because a violation of the by-law designed for their protection if such violation has been persistent enough to have become habitual.

In *Campbell vs. Watson* (N. J.), 50 Atl., 120, it is said:

“Another point made was that the fact that the by-law in question had been disregarded and fallen into disuse for so long a time was evidence from which the court might presume a repeal of it. I think the advancement of this argument hurts rather than helps the defendants. If I am right in my conclusion that the by-law is a wholesome and proper one, well contrived to protect the assets of the bank, then its repeal must be considered as a deliberate attempt on the part of the directors to give themselves a license to be negligent in the performance of their duties; and, of course, any conduct which would indicate a repeal by implication is subject to the same criticism.”

It is interesting to note that in that case, as in the case at bar, the defense was interposed that the bank had been occasionally examined by the state bank examiner. Of this defense the court declares:

“I am of the opinion that the fact that such examinations were occasionally made furnishes no

excuse to the directors for not acting under the by-law.”

It was further urged in favor of some of the defendants that they were not aware of the existence of the by-law in question, but in answer to this contention, the court declares:

“It seems to me quite impossible, from the judicial standpoint, to hold that these defendants are excusable on the ground of their ignorance of the provisions of the charter of their corporation and the by-laws made according to law, and thereby forming a part of their charter.”

Let us next consider the particular loans to the Pollards, the Salmon Lumber Company and Brown. Was there such carelessness and negligence with respect to these as to render the directors liable at common law? King explains that notes were taken from time to time to cover overdrafts (pp. 286, 287), and that the notes held by the bank when it closed its doors represented the aggregate of overdrafts allowed these persons. The record discloses that the Salmon Lumber Company was operated by the relatives of Appellee King (p. 286), that he extended credit to this concern to about \$15,000.00 (pp. 165, 168); that Harry Brown, who obtained an aggregate of \$12,750.00, was engaged in the lumber business under some agreement entered into with the Salmon Lumber Company, having for its object the control of the lumber industry in the Salmon country (pp. 352, 353), and that the Pollards were allowed to overdraw because from appearances King seems to have considered a loss improbable. It appears from the

evidence that Defendants' Exhibit 2 (Discount Register) is a book furnished by the Comptroller of the Currency in which was to be listed all loans made and which was to be inspected by the directors each month (p. 331), but it is significant that King did not enter in that record any of the loans above referred to (pp. 331, 333). He says they were not loans because they were overdrafts. It cannot be that in his efforts to promote the interests of the Lumber Company and Brown, he feared discovery by the board of directors, for the board never made investigation, but it is evident that he wished these matters to escape the eye of the bank examiner, who would have criticized any such loans if they had come under his observation. The losses because of these loans were the result of the same policy of mismanagement which resulted in the losses from overdrafts and yet in face of the showing made, the trial court held that only King and Andrews were liable and these persons only to the amount of the excess of each loan above \$6500.00, and not at all for overdrafts.

In *Williams vs. McKay* (N. J.), 18 Atl., 824, it is held that "for losses occasioned by loans made by the president, habitually and continually in disregard of the charter and by-laws and not interfered with by the managers, all managers in office at the time of the making of the loans are liable."

The following is from the opinion of the court:

"It is next important to determine what duty devolved upon the managers with reference to loans by the bank. That duty was defined by Chief Justice Beasley in this case, when it was before the

court of errors and appeals upon demurrer to the bill (40 N. J. Eq., 195), in these words: 'The duty belonging to such a situation is a plain one—to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing.' * * * These defendants held themselves out to the public as the managers of the bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. In short, the duty was to lend the bank's money not only in the manner indicated and required by the charter, but also prudently; the prudence required being measured by the character and objects of the institution. It cannot be questioned that in pursuance of their duty it was proper for the managers to define the duties of the officers of the bank, and, to facilitate the transaction of business, to appoint small committees from their number to superintend those officers, and dispose of unimportant detail and routine work that could not readily be disposed of by the more numerous and unwieldy board of managers, for it would be almost impracticable for the managers, in a body, to attend to such matters. But it does not follow, because of the appointment of such officers and committees, that the managers, who were not charged with official duty, might relax vigilance, and rely entirely upon officers and committees. A man of common prudence and skill in managing a similar business for himself, would not be guilty of such unguarded confidence. He would from time to time acquaint himself with the manner in which such delegates were performing their duties, and with the practices which prevailed in the conduct of the business, so that he might determine whether the

business methods were safe and proper. He might not look so closely into the affairs of the business as to detect concealed and isolated instances of wrong-doing, but he would so familiarize himself with their workings that he would readily detect habitual looseness, carelessness, and wrong-doing. Upon this subject the chief justice remarked: 'The charter required the defendants to meet at least twice a year as a board of managers; and such regulation was almost entirely useless, unless on such occasions it was their duty to supervise the conduct of their committees, and to look generally into the affairs of the company. There is no ground for the belief that it was the intention of the legislature that none but such managers as acted on committees should have the charge of the affairs of this bank. The only guaranty given to depositors consisted in the reputation of its managers with respect to probity and fiscal ability, and such guaranty was a mere snare, if more than two-thirds of such officers were to have no substantial part in the management. Doubtless, such officers had the right to rely in many respects on the skill and diligence of their committeemen, and if exercising a reasonable circumspection, they were unaware of the misconduct or neglects of such agents, they would not be responsible for the consequences. But so plain was their duty to oversee the business done by such committeemen that, it seems to me, they are chargeable, *prima facie*, with a knowledge of what was doing, or had been done, in all important matters by such bodies.' * * * The finance committee appears to have exhibited a similar indifference to the duty imposed upon it. At each meeting of the board of managers the lists of the securities of the bank showed new investments, upon which the committee

had never acted; yet it failed to assert its right to pass upon the investments, and to protect against the usurpation of its functions by the officers of the bank. The atmosphere was one of apathetic disregard of personal obligation, and abject submission to the will of the president of the bank. There does not seem to have been the least inquiry into the propriety, honesty, or legality of his methods until after it was discovered that the bank had been ruined."

How applicable is the foregoing to the facts in the case at bar. Habitually and continually King and Lottridge violated not only the statute relating to excess loans, but the by-laws of the institution and all rules of safe banking, and their wilful and negligent conduct was allowed to proceed without interruption by the Loans and Discount Committee and the Board of Directors. Although the by-laws required reports from such committee, so far as the evidence shows, the Board never had such a report submitted to it, and never called for one; and while this committee was, of course, clearly negligent, and while its negligence contributed to the condition of insolvency, so also did the negligence of the Board of Directors in not seeing to it that this committee furnished proper reports, and in not supervising and overseeing generally the affairs of the institution and keeping watch upon the acts and transactions of the President and Cashier. As stated in the case just cited, the appointment of the Loan and Discount Committee did not permit the Board of Directors to relax their vigilance, neither can they escape the consequence of their negligence in failing to perform the duties which

their oath enjoined upon them by claiming that the responsibility was shifted upon the Loans and Discount Committee or to the officers whom the Board of Directors had selected to actively manage the daily affairs of the bank.

It will be urged on behalf of Appellee Bowerman that he could not conveniently attend the meetings of stockholders and directors owing to the length of time it would require to go from St. Anthony to Salmon (pp. 53, 292); that he had no actual knowledge of the excessive loans and no information that the bank was being mismanaged. In his answer, Bowerman admits knowledge of mismanagement and contents himself with the plea that he remonstrated "with Harry G. King, president of said bank" (p. 54). He also pleads that when his protests were unheeded he resigned, but there is no evidence to that effect, in fact, Bowerman offered no evidence. It is also shown by Plaintiff's Exhibit 34 (page 293), written after the bank's failure, that Bowerman "commenced in July, 1910, writing the president of the institution and warning him as to what in my judgment would be the consequences if the policy of the management was not changed," etc.; that he felt it to be his duty to call attention "at various times, in no uncertain terms, to what seemed to me to be a very hazardous manner of conducting the bank" (p. 294). The entire letter is an effort of Bowerman to excuse himself and clearly shows his knowledge of conditions. However, let us concede that he was not fully advised, was it competent for the organizers of the bank to exempt him from responsibility and for Bowerman to thus secure

immunity, notwithstanding he continued to take oath as a director and hold himself out as such?

In *Warren vs. Robinson* (Utah), 57 Pac., 290, the court quotes with approval the following declaration of Lord Chancellor Hardwicke:

“I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown.
* * * * Therefore, committeemen are properly agents to those who employ them in the trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance.”

Referring to malfeasance or nonfeasance, the chancellor said:

“To instance, in non-attendance: If some persons are guilty of gross non-attendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees.”

In *Marshall vs. Farmers' etc., Savings Bank*; 85 Va., 676; 17 Am. St. Reports, 84, it is held:

“Bank directors are liable to the depositors for losses resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of

directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, or from not being properly protected, or enforced by appropriate proceedings. The fact that any particular director did not know of these wrongdoings will not exonerate him, because he could not be without such knowledge, except from his own negligence.”

In the course of its opinion, the court declares:

“But the co-directors seek to escape responsibility for all this, including the large loss to the Washington and Ohio Railroad, by claiming to have no actual knowledge of it at all. Did they exercise ordinary diligence to inform themselves, as their duty certainly required that they should? They were required to meet weekly by their own by-laws. They did not always meet semi-annually,—meeting sometimes once a year, as we have stated. They were in duty bound to cause the books of the bank to be examined at regular intervals. This they never did at all throughout their whole career, nor did they ever call for a statement of their accounts with other banks. Their vaults and their cash-drawer were emptied by illegal abstractions and insolvent loans, and they admit that they never knew it, and pleaded this as their exculpation. The stock subscribed for was not paid up, as has been stated, and yet such part as was paid up was treated as a loan, and interest paid on it, and a large part had never been paid up at the time of the suspension, and some of it has not yet been paid up. Having a bank with so small a nominal capital, with empty vaults, and despoiled cash-drawer, they owed at

the suspension of the bank, to depositors who had intrusted to them their money, \$53,063.63, on which they have been able to pay ten per cent. If these directors had any duty to perform whatever towards their depositors, the records of this case do not show its performance. They plead ignorance. One of their number was the president of the Washington and Ohio Railroad in its last hours, and knew its condition, and secured himself; but the notes due the bank were allowed to sleep unprotected, unsecured, unrenewed, uncollected, and unsued on. One of their number was the president of the Alexandria Passenger Railroad Company, and knew its condition. One of their number was the brother of their defaulting debtor, Jameison, who was insolvent at the time of the loan of thousands to him without security. It is difficult to concede that they could have been ignorant of all this. But suppose they were. Their duty required that they should have looked well into all these matters; and if they have negligently trusted them to others, and loss has occurred, should it fall on them, or upon the depositors, who had trusted them, and whose trust they had accepted, and to whom they had solemnly promised such care and attention as were to be expected of good business men?

“We think the record shows that these directors, and all of them, have been guilty of such negligence in the premises as makes them personally liable for the losses caused by their negligence, and we are of opinion that the circuit court of Alexandria City erred in holding them exonerated. While this is true, there is nothing in the record which shows any bad faith, or tends to show any dishonesty on the part of some of these gentlemen, who appear to have confided their duties to others, and to have

been betrayed by them; but this was such negligence as will fix liability upon them, and their act in assuming this attitude of trust and confidence was voluntary and led to the confidence which has resulted in loss.”

In Rankin vs. Cooper, 149 Fed., 1010, it is said:

“It is also urged in defense of Col. Roots that he was necessarily absent from Little Rock a great deal, and hence unable to attend many board meetings. The same defense is made on behalf of Defendant Blass, who spent much of his time in trips to the East in connection with his mercantile business. But to permit this to operate as a defense in a case of this kind would be putting a premium on the failure to attend board meetings and a penalty on those who attend regularly.”

Proximate Cause of Loss.

At the conclusion of the taking of the evidence the court made the following inquiry:

“On the assumption that the court may find the directors negligent, is there any evidence that the negligence contributed to the damage or loss? If it appears that the directors were negligent, how is the loss resulting from such negligence to be distributed, the question more specifically applies to Mr. Bowerman, whether or not, if it is assumed that it was negligence for him to remain away from the meetings, upon what basis could the court rest its conclusion that his negligence in that respect resulted in injury or loss to the bank or its stockholders, and whether his presence would have availed them anything?”

Assuming that the same question may arise in the minds of this court, we shall discuss it briefly.

There can be no question under the authorities which we have already cited, that Mr. Bowerman's conduct in failing to attend a single directors' meeting from the organization of the association in 1906 up to its failure on June 8, 1911 (p. 291), was the grossest kind of negligence. Can it be said that he, in any manner whatsoever, discharged the duties enjoined by his oath to diligently manage the association? If he had done anything toward the management of it, it might be necessary to determine whether his negligence was slight or gross, but when there is no conflict in the proof that he did nothing at all in performance of his duties especially when he had some knowledge that the bank was being mismanaged, then, of course, his negligence can be nothing else than gross. So, as to Mr. Bowerman, gross negligence is proven. Let us go one step further. The loss has been proved, and we are only required now to convince the court that Bowerman's negligence was the proximate cause of such loss. We shall endeavor to do this, but we desire first to say that it was not incumbent upon us to go to the extent indicated by the court and show that if Bowerman had been in attendance at the meetings, the result would have been otherwise. We contend that, having shown that a duty was enjoined upon Bowerman to exercise care and diligence to prevent mismanagement and thereby to prevent the loss which has resulted to the bank, and having further shown that he wholly disregarded that duty and that the other members of the board disregarded similar

duties enjoined upon them, that is to say, the duty of informing themselves of the bank's condition with respect to the loans in question and other similar loans, and of supervising the affairs of the bank, whereby said loans would have been prevented or adequate security obtained for their protection, that we have made a case against Mr. Bowerman, upon the theory that the negligence of all of the directors, either in failing to supervise the bank or in failing to prevent the continued misconduct and mismanagement of the President and Cashier, raises the conclusive presumption that the mismanagement occurred and continued because of such negligence, and the members of the board of directors, having each been negligent, though it be in different manner and in different degree, renders each liable for the loss which the mismanagement entailed. The selection of a Loan and Discount Committee did not relieve the directors from giving that attention to the bank's affairs which otherwise might be expected and required of them. We have shown by the authorities heretofore cited, that the appointment of such a committee could not, as a matter of law, exempt the directors from the performance of the duties and obligations with which they were charged as the managers of the association, and it cannot be said that although the proof shows that Mr. Bowerman neglected to attend the meetings of the board of directors and was therefore negligent, that what might be termed the intervening negligence of the Loan and Discount Committee could save him from responsibility. His act in absenting himself, or rather, his negligence for failing to supervise the institution and

to attend the meetings of the board of directors, was a proximate cause of the loss, no matter how gross the negligence of the Loan and Discount Committee. Upon this question of proximate cause, we direct the court's attention to the case of *City National Bank vs. Crow*; Okla., 111 Pac., 210, wherein the court declares:

“In the case at bar it is admitted that the defendants made a loan that was in excess of the statutory limit, and that a loss was suffered by the bank by the non-collection of the full amount of said loan. But the defendants contend ‘the loss was occasioned by the intervening negligence of our successors in office in not exercising due care and diligence in the sale of the property taken to secure the loan, and not by our original negligent act in making the same.’ We do not believe the rule contended for by counsel applies to the instant case. It is true that, as a general rule, if one is guilty of a negligent act which would not have produced the loss or injury but for the subsequent intervening negligence of another, he will not be responsible for the resulting damages. 1 Thompson’s Commentaries on Law of Negligence, 55. This doctrine, however, is subject to the provision, among others, that the circumstances were such that the injurious result which did happen might have been foreseen as likely to result from the first wrongful act or omission. 1 Thompson’s Commentaries on the Law of Negligence, 57. The test of whether the act complained of was the remote or proximate cause of the injury is to be found in the probably injurious consequences which were to be anticipated; not in the number of subsequent events and agencies which might arise. 1 Thompson’s Commentaries on the Law of Negligence, 58. The sections of the act of

Congress under consideration ‘treat the directors of a national bank as persons charged with a duty and a trust for the benefit of other parties; and, that when they violate such trust, the statute in effect declares that they shall compensate the parties who have been injured for that violation of the trust.’ ”

In point of upholding the principle that, though an intervening cause of negligence (the negligence of directors other than Bowerman, who attended the meetings and who failed to prevent the wrongful conduct by King and Lottridge, and also the negligence of the Loan and Discount Committee for also failing to restrain or prevent such unlawful and negligent conduct) may contribute to the injury suffered, nevertheless, another sort of negligence (that of Bowerman, in failing to discharge his duties as director by attending meetings, or otherwise), will also be held as a proximate cause, we refer to the case of *Wilmington Star Mining Company vs. Fulton*; 205 U. S., 58; 51 L. Ed., 708. In that case the question was whether or not the proximate cause of the injury suffered by the plaintiff was the improper direction given by the manager in ordering the plaintiff into the mine, or the fact that the mine was allowed to become filled with gases and thereby rendered unsafe as a place in which to work. The following is from the opinion of the court:

“Now, conceding that the mine manager ordered Fulton into the west roadway, and conceding, further, that such order of the manager was one of the causes of the accident, for which no recovery could be had because not counted on in the declara-

tion, what follows? Simply this, that two concurring causes contributed to the death of Fulton,—one, the order of the mine manager, for which recovery could not be had under the declaration, and the other, the neglect by the mine owner to perform his statutory duty to prevent the accumulation of the dangerous gases which led to the accident. But, because one of the efficient causes, the order of the mine manager, under the pleadings, did not give rise to the right of recovery, it did not follow that therefore the owner was absolved from responsibility for the cause of the accident for which he was liable. *Washington & G. R. Co. vs. Hicksy*, 166 U. S., 521, 41 L. Ed., 1101, 17 Sup. Ct. Rep., 661.”

In *Chicago, etc., Railroad Company vs. Dinius; Ind.*, 84 N. E., 9, the court gives the following definition of proximate cause:

“Proximate cause is the efficient cause, or that which originates and sets in motion the dominating agencies that necessarily proceed, through other causes as mere instruments or vehicles in the natural lines of causation to the resulting controversy.”

Applying this rule to the case at bar, we assert that Bowerman’s negligence in absenting himself from the directors’ meetings, and in failing to supervise the conduct of the bank’s affairs, was an efficient cause of the bank’s loss, for the reason that it was because of such negligence that King and Lottridge were permitted and allowed to continue in their wrongful conduct.

In *Strauhal vs. Asiatic S. S. Company*, Ore., 85 Pac., 230, the court quotes from *Brown vs. Cox Bros.*, 75 Fed., 689, as follows:

“The creation of a joint liability in tort does not depend upon proof that the same act of wrongdoing was participated in by both tort-feasors and that they were in concert and had a common intent or were engaged in a joint undertaking. But the rule under which parties become jointly liable as tort-feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted, because the acts or omissions of both have contributed to it.”

In *Memphis, etc., Gas Company vs. Creighton*, 183 Fed., 852, it is said:

“It is claimed that the proximate cause of the injury was the act of Mrs. Bramhall in bringing the lighted match into contact with the gas. This might be so if it had been a supervening cause which rendered the first cause inoperative. The truth of the matter is that the causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. The effect of the former had not ceased, but co-operated with that of the other in effecting the injury. In such case an inquiry about the proximate cause is not pertinent, for both are liable. *Grand Trunk Ry. Co. vs. Cummings*, 106 U. S., 700, 1 Sup. Ct., 493, 27 L. Ed., 266; *Gila Valley, etc., Ry. Co. vs. Lyon*, 203 U. S., 465, 27 Sup. Ct., 145, 51 L. Ed., 276; *Deserant vs. Cirilles, etc., Ry. Co.*, 178 U. S., 409, 20 Sup. Ct., 967, 44 L. Ed., 1127; *Kreigh vs. Westinghouse, etc., Co.*, 214 U. S., 249, 29 Sup. Ct. 618, 53 L. Ed., 984;

and our own decision in *Great Lakes Towing Co. vs. Kelley Island, etc., Co.*, 176 Fed., 492, 497, 100 C. C. A., 108. If the act of one be not negligent when tested by rules of law, a priori, must that one be liable whose culpable negligence has led directly to the injury without the intervention of any unlawful act. Whether Mrs. Bramhall was guilty of an inexcusable negligence in her use of the lighted match would be a question of fact with which we do not propose to deal. For the present purpose it is immaterial. It would be a profitless task if we should undertake to expound the general doctrines of proximate cause, or to canvass the great number of cases which the industry of counsel has collected in their brief. One point, however, we think it proper to notice. It is contended that it would not have been foreseen as probable that a lighted match would be put near the gas, and that therefore the defendant would not be liable for an accident caused thereby. There are many cases in which such language has been employed, but incorrectly as we think. If the thing done produces immediate danger of injury, it is not necessary that the author of it should have in mind all the particular results which might happen from the presence of the danger. *Doyle vs. Chicago, St. P. & K. Ry. Co.*, 77 Iowa, 607, 42 N. W., 555, 4 L. R. A., 420; *Texas & Pac., Ry. Co. vs. Carlin*, 111 Fed., 777, 49 C. C. A., 605, 60 L. R. A., 462, affirmed 189 U. S., 354, 23 Sup. Ct., 585, 47 L. Ed., 849.

“The third proposition is, in substance, that the result would have been the same if a lighted match had been applied, as was done by Mrs. Bramhall, before the time when the defendant became negligent. Perhaps, but only perhaps. The accumula-

tion of gas was constantly increasing, and an explosion at an earlier time might not have been so serious as to have caused the injury complained of. The proposition itself is a matter of speculation, and without value in determining the result of the actual conditions in which the injury happened.”

In line with these authorities, we contend that there were several concurrent causes of the loss suffered by the bank:

1. Wrongful conduct of King and Lottridge in making the improper loans.

2. Negligence of the loan and discount committee in failing to make proper inspection to ascertain the condition as to the bank's loans, and in failing to render reports as required by the by-laws.

3. Negligence of the members of the board of directors who did attend the meetings of the board and who either passively acquiesced in the misconduct of King and Lottridge or indifferently allowed them to proceed unrestrained, and who neglected to require the loan and discount committee to furnish the board with detailed information as to the bank's loans, and in failing to exercise supervisory control of the bank's affairs.

4. Negligence of Bowerman in failing to attend directors' meetings and in failing to inform himself as to the bank's condition, and in failing to exercise any supervision as a director.

It will not do to say that results might have been just the same even if Bowerman had attended the meetings and otherwise performed his duty. He has no right

to the application of any such a rule. He is liable if the loss was the probable result of, or likely to follow, his neglect of duty.

Suppose Bowerman had attended the meetings of the board, but had done nothing to keep himself informed of the conduct of King and Lottridge, would his negligence have rendered him liable? Certainly. Then, to say he is not liable when he is guilty of still greater negligence is to say in effect that the more he was at fault the less his responsibility. That cannot be and is not the law.

Before we close the discussion of the common law liability of directors, we wish to call attention to one more authority, which so clearly defines their duties and obligations as to leave nothing else to be said upon the subject. It is the case of *Campbell vs. Watson* (N. J.), 50 Atl., 120, and the opinion is by Vice Chancellor Pitney:

“The question to be determined, then, is simply, how much money has the bank lost by the negligence of the defendants in the performance of their duty as directors? And here we must meet the question of what is actionable negligence in the concrete, as applied to the particular facts of the different specifications of negligence found in the bill and sustained by the proofs. At the outset, I make some preliminary observations: First: The language of this topic, of judges, as reported in the books, must, in all cases, be construed in the light of the facts of the particular case. Second: The various directions in which the care of directors of banking institutions should be exercised in order to protect against fraud and theft of employes has greatly in-

creased in number and variety within 50 years. Experience has developed modes of theft by such employes unknown and unthought of half a century ago, and these manifestations of ingenuity on the part of the thieves has been met by new safeguards on the part of the directors; so that what years ago would have been considered due diligence cannot be so considered today. Third, so numerous have been the defalcations and dishonest abstractions of money by employes of high grade, who had by years of right living and acting earned the confidence of their employers, that it has become well-nigh a maxim with such institutions to, so to speak, trust nobody beyond what is necessary to the practical business of the bank, and to subject the work of each one, from the highest to the lowest, to periodical investigation. Fourth: That at one time and in some instances bank directors were unpaid servants, who were not expected to spend much time or to give much attention to the affairs of the institution, and on that account were dealt with leniently by the courts; but at this day such officers are not expected to work gratuitously, and are usually paid a fair compensation; and, whether paid or not, they are entitled to no indulgence on that account. Their names give credit and standing to the institution, and are guaranty to dealers that its affairs will be conducted with reasonable prudence and care, and according to law. They are, in my opinion, bound to acquaint themselves with the extent and mode of supervision exercised by officers of a well-conducted banking institution in the neighborhood. I cannot yield to the suggestion of some of the defendants' counsel that the fact that the institution in question was a small country bank relieved its directors from adopting the same practical

measures for protection against frauds and thefts as were in use by its greater neighbors in the larger towns. Fifth: Another observation is that the directors cannot be held liable for a mistake in an honest judgment upon matters properly mere matters of judgment, as distinguished from matters of administration. In matters of administration, where a duty to perform certain functions devolves upon them, they are justly held liable either for their non-performance, non-feasance, or their lack of ordinary diligence in their attempted performance, whereby loss is incurred. By 'ordinary diligence' I mean such as is exercised by other prudent and diligent officers under like circumstances."

Upon the question as to how the loss resulting from the negligence of the directors is to be distributed, we reply that each is liable for the entire loss which occurred during the period while he was a director. Such clearly is the conclusion reached in *Rankin vs. Cooper*, see 149 Fed., 1017.

The same question was considered in *Warren vs. Robison*, wherein the court states, quoting from Chancellor Hardwicke:

"Another objection has been made that the court can make no decree upon these persons which will be just, for it is said a man's non-attendance or omission of his duty is his own default, and that each particular person must bear such proportion as is suitable to the loss arising from his particular neglect, which makes a case out of the power of this court. Now, if this doctrine should prevail, it is indeed laying the ax to the root of the tree, but if on inquiry before the master there should appear

to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty. Nor will I ever determine that a court in equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity.”

And Chancellor Pitney, in *Campbell vs. Watson*, concluded his opinion with the remark:

“For the reasons already stated at too much length, I am unable to find any of the defendants blameless, and will find a decree against all for the several sums above mentioned.”

In *Williams vs. McKay* (N. J.), 18 Atl., 824, it is said:

“Where a loss has resulted from dishonesty, disregard of the charter’s requirements, or culpable negligence, all the defendants who are chargeable with such faults must be held alike responsible, so far as the receiver is concerned, without reference to the degree of dereliction; but, as between ~~our~~^{them} selves, there may be grades of liability, according to the degrees of culpability. In 2 *Lewin, Trusts*, 909, it is said: ‘Though, as respects the remedy of the *cestui que* trust, each trustee is individually responsible for the whole amount of the loss, whether he was the principal in the breach of trust or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate.’ In considering the various items of loss for which the defendants are liable, I have taken into consideration the equities

which appear to exist between them, with a view to establish the order of their liability.’’

See also:

Marshall vs. Farmers’ etc., Bank; 85 Va., 676;
17 A. St. Rep., 84.

We respectfully submit that the decree of the trial court should be reversed and that judgment should be entered against each of the appellees based upon their common law liability, for the entire amount of the loss to the bank by reason of their negligence, that is, to say, for \$26,374.85 loss sustained by reason of improvident loans and \$3900.00 on account of overdrafts, making a total of \$30,274.85.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK B. McCORMICK, as Receiver of the First
National Bank of Salmon, Idaho, a Corporation,
Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE
BUCK, GUY E. BOWERMAN, B. F. OLDEN,
FRED G. HAVEMANN and JOHN LOTTRIDGE,
Appellees.

BRIEF OF APPELLEE GUY E. BOWERMAN

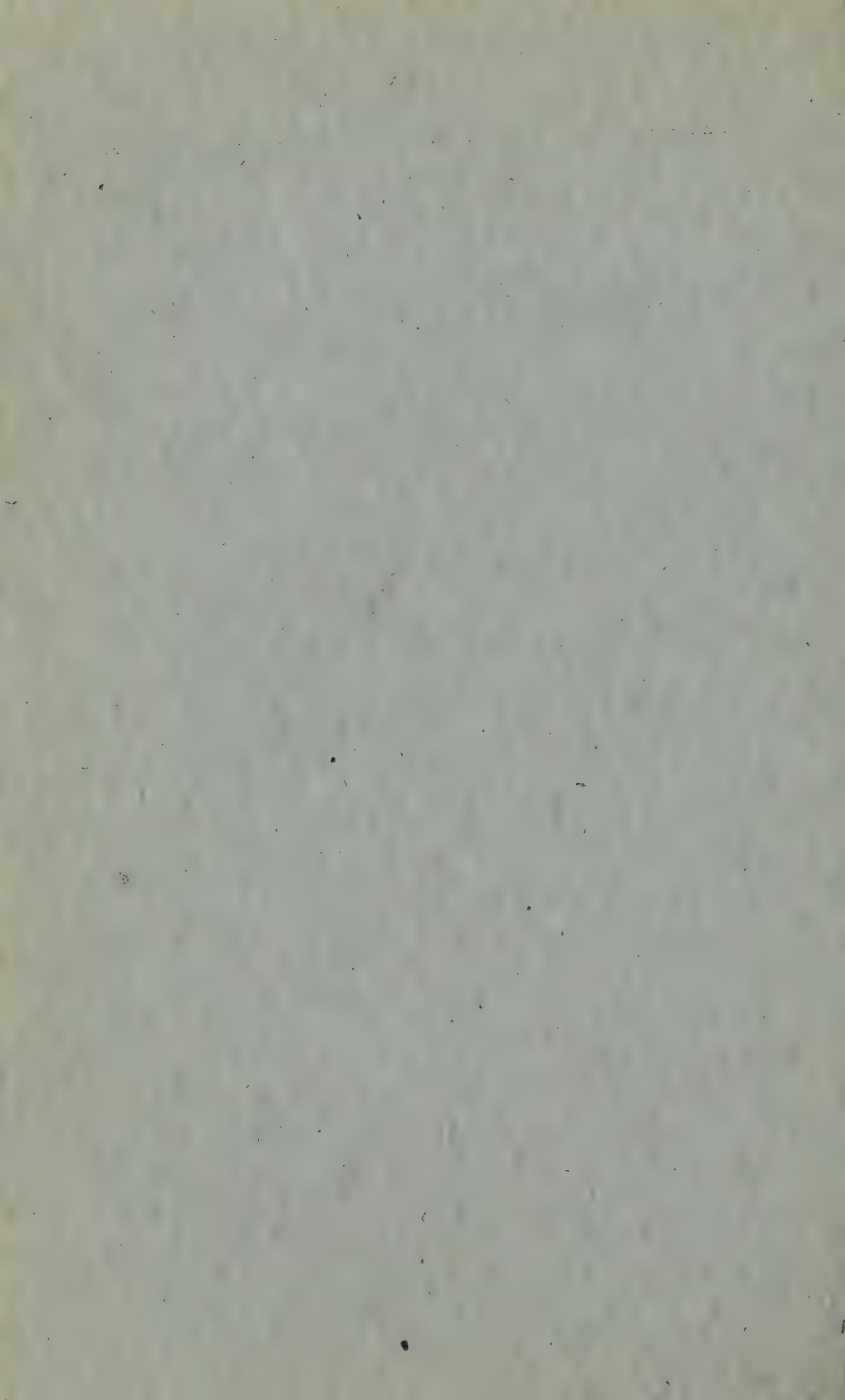
*Upon Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

RICHARDS & HAGA,
McKEEN F. MORROW,
Attorneys for Appellee Guy E. Bowerman.

File

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BRIEF OF APPELLEE GUY E. BOWERMAN

*Upon Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

STATEMENT.

This action was brought by appellant as Receiver of the First National Bank of Salmon, Idaho, against appellee Bowerman (and others) as directors of such bank under the provisions of Sec. 5239 Rev. Stats. of the United States, to recover damages alleged to have been sustained because, as we contend, of the four following alleged violations of such statute:

(a) Excess loans, as alleged in paragraph V, page 11.

(b) Because of the negligence in purchasing the bank of Langsdorf & Company, as alleged in paragraph IX, page 17, of the transcript.

(c) By accepting an alleged illegal dividend, as alleged in paragraph XII, page 24 of the transcript.

(d) Permitting improvident overdrafts, as alleged in paragraph XIII, on pp. 25-26 of transcript.

But as counsel for appellant assured us in writing that the above charge (b) would not be raised on this appeal, we assume this charge has been abandoned, and as no claim thereon is made in the brief of appellant, and as there is no assignment of error covering such point we shall not comment further thereon in this brief. Also, as counsel do not refer to the above allegation (c) in their brief, and make no assignment of error concerning same, we assume they have abandoned such contention and hence further comment thereon is unnecessary.

This leaves but two charges—(a) that of excess loans in violation of sec. 5200, Rev. Stats. of United States; and (d) that improvident overdrafts were permitted.

Trial was had before the Court without a jury. When appellant rested, appellee Bowerman moved the Court to dismiss the action as to him (Tr. pp. 319-320), and such motion was sustained and the action was dismissed as to appellee Bowerman (Tr. pp. 132-133), from which decree this appeal was taken.

In the complaint (Tr. p. 11, par. V) it is alleged that appellee Bowerman "knowingly permitted and assented to the making of loans by the officers * * * far in excess of the limit provided by sec. 5200 of the Revised Statutes of the United States." The undisputed testimony, as well as the allegations of the complaint, show that the appellee Bowerman had no actual knowledge of any of the acts of the board. This reduces the question to one of presumption or constructive knowledge merely.

The undisputed testimony in the record shows the following facts:

(1) That the cashier was under bond for the faithful performance of his duties (Tr. p. 136).

(2) That the president of the bank was under bond for the faithful performance of his duties (Tr. pp. 136-137).

(3) That under the by-laws no officer of the bank could pay out any money or any check unless the drawer of the check had on deposit sufficient funds to meet such check (Tr. p. 138, sec 19).

(4) That the vice-president of such bank received \$100 per month to act as chairman of the committee on Loans and Discounts (Tr. pp. 164-165).

(5) That the board of directors of the bank shall at each monthly meeting or oftener examine and approve all loans and discounts and such approval shall be recorded in a book kept for that purpose (Tr. p. 165).

(6) That appellee Bowerman lived at St. Anthony, Idaho, and it required three days for him to go from his home to Salmon, where the bank was situated (Tr. p. 292).

(7) That appellee Bowerman never had any notice of meetings of the board (Tr. pp. 291-292).

(8) That had appellee Bowerman attended the meetings of the board, he would have had no knowledge of the alleged excess loans, because they were not direct loans but for accumulated overdrafts not appearing on the record submitted to the board (Tr. pp. 286, 287, 288).

POINTS AND AUTHORITIES.

The liability of the directors of a national bank under the provisions of secs. 5200 and 5239 of the Federal sta-

tutes is several.

Chesbrough v. Woodworth, 195 Fed. 875, 880; 116
C. C. A. 465.

The liability of appellee Bowerman is measured by the promise not to knowingly violate or willfully permit to be violated any of the provisions of such statute.

Thomas v. Taylor, 224 U. S. 71; 56 L. Ed. 673-677.

The rule of civil liability of a director of a national bank is fixed by sec. 5239 of the Federal statute.

Yates v. Jones National Bank, 206 U. S. 158; 51
L. Ed. 1002.

Mason v. Moore, 73 O. St. 290; 4 L. R. A. (N. S.)
597.

Emerson v. Gaither, 64 Atl. Rep. 26.

The burden of proof is upon appellant to bring appellee within the terms of the Federal statute.

Warner v. Pennoyer, 33 C. C. A. 222; 91 Fed. 537.

Wells v. Graves, 41 Fed. 459.

To recover against appellee Bowerman, it must be shown that he was guilty of some fraud or knew of or connived at some fraud in others, or that such fraud might have been prevented by him had he given ordinary attention to his duties as a director.

Briggs v. Spaulding, 141 U. S. 132; 35 L. Ed. 662.

Wither vs. Soules, 31 Fed. 1.

It does not follow because appellee Bowerman failed to attend meetings of the board of directors that he is thereby responsible for the losses sustained.

Warner v. Pennoyer, 33 C. C. A. 222; 91 Fed. 537.

The appellee Bowerman is not presumed liable because he failed to examine the books of the bank and knowledge should not be imputed to him which the record shows he did not possess in fact.

Briggs v. Spaulding, *supra*.

Clews v. Borden, 36 Fed. 617.

Warner v. Pennoyer, 82 Fed. 181.

Under the Federal statutes, appellee Bowerman is liable only for what he knowingly did or neglected to do.

Jones Natl. Bank v. Yates, 139 N. W. 844.

There should be facts charged and proved showing the alleged losses resulting from the gross neglect of the appellee Bowerman to attend meetings of the Board.

Williams v. Brady, 221 Fed. 118.

ARGUMENT.

Basis of Right to Recover.

The right to recover on the charges of the character here alleged is based upon the provisions of sec. 5239 and other relating sections of the Federal statutes. The above section, so far as it relates to the questions here presented, reads as follows:

“If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited * * * and in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.”

The question of forfeiture mentioned in the first portion of the section just quoted does not arise in the case at bar, but the question of participating in or assenting to the alleged violation of sec. 5200 by appellee Bowerman does arise on this appeal. It seems evident that the words "such violation," as twice used in the second portion of the above section just quoted, refer to the acts of the board in the first portion of the section in knowingly violating or knowingly permitting any officer to violate the statute. The thing evidently prohibited by this section is knowingly violating or knowingly permitting a violation of such statute; and these words "knowingly violate or knowingly permit any of the officers or servants of the association to violate any of the provisions of this title" seem to refer to acts by the board, and the words "every director who participated in or assented to the same" makes each of such directors liable. These words also imply some positive action by the board as well as each participant, that is, some action of commission rather than of omission which implies active knowledge or participation unless such acts of omission were so grossly negligent as to amount in law to an act of commission. This language evidently renders such directors severally liable for such violation, as shown not only by the language of such section itself but also from the statement of the court in *Chesbrough v. Woodworth*, 116 C. C. A. 465; 195 Fed. 875, where the Court, in considering this very section and on page 880, states:

"The liability of the directors upon such a subject matter is several. The plaintiff may arbitrarily elect one as sole defendant or two or more to be joined as defendants. Against each individual selected, a

sufficient case must be made out to show that he participated in the tort for which a verdict is had.

Measure of Liability.

Counsel for appellant in their assignments of error seek to establish a common law liability against appellee Bowerman rather than such statutory liability as shown in their assignments of error, and in their brief, at page 12, they state: "The question for determination is whether or not each of the appellees is liable at common law for the entire loss sustained by the bank." Then they attack the case of *Briggs v. Spaulding*, 141 U. S. 132, and they cite the case of *Gibbons v. Anderson*, 80 Fed. 345, as sustaining their contention.

The case of *Gibbons v. Anderson* was a case where the trouble arose by reason of the general negligence whereby fraud was committed, but in the case at bar the pleading is based on a violation of sec. 5200 of the Federal statute, where, in paragraph V, on page 11 of the transcript, it is alleged "that the defendants (naming them) * * * knowingly permitted and assented to the making of loans by the officers, agents and servants of the First National Bank of Salmon far in excess of the limit provided by sec. 5200 of the Revised Statutes, of the United States," and in paragraph VI, on pages 12 and 13 of the transcript, it is alleged, "that the said loans * * * were each and all in violation of section 5200 of the U. S. Revised Statutes;" and in sub-paragraph (a) of paragraph X, on page 20 of the transcript, it is alleged "that the said loan is the same loan mentioned in paragraph V hereof, as being in excess of the amount allowed to be loaned under the provisions of sec. 5200, and in sub-paragraph (c) of para-

graph X, on page 22 of the transcript, it is alleged "Said loans are the same loans mentioned in paragraph V hereof and therein alleged to be in violation of sec. 5200."

These allegations show that appellant made special effort to frame such allegations directly within the rule declared in the statute, hence the question is, Does the common law rule of negligence or the terms of sec. 5239 constitute the measure of liability of appellee Bowerman? We contend that his liability is measured by the terms of the statute. We feel we are sustained in this contention by the ruling in the case of *Yates v. Jones National Bank*, 206 U. S. 158; 51 L. Ed. 1002, and on pages 1013 and 1014 the Court says:

"Considering the text of the national bank act, as now embodied in the Revised Statutes, including sec. 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. * * * As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them. That the words 'shall knowingly violate, or knowingly permit,' etc., found in the first sentences of sec. 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he

swears 'that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title.' Mark the contrast between the general common-law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.' In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposed certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.'

"And general considerations as to the spirit and intent of the national bank act * * * also render necessary the conclusion that the measure of responsibility concerning the violation by directors of express commands of the national bank act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act."

And on page 1015 the Court further states:

"Where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional."

And such Court refers to *Mason v. Moore*, 73 O. St. 275; 4 L. R. A. (N. S.) 597, where the Court, on page 605, states:

"We have in this section the statutory standard of liability and it relates to every director who participated in or assented to the violation of the provisions of the statute of which said action forms a part. If he did not participate in or assent to such violation,

this statute fixes no individual or personal liability against him."

This ruling is approved in *Thomas v. Taylor*, 224 U. S. 71; 56 L. Ed. 673, 677.

Burden of Proof.

The appellee Bowerman having been selected as one of the directors who is alleged to have participated in or assented to the violation of such sec. 5200 in making excess loans, we contend that the burden is on the appellant to affirmatively show that the appellee in some way participated in or assented to the violation alleged. This rule is announced in *Chesbrough v. Woodworth*, 116 C. C. A. 465; 195 Fed. 875, and on page 880 the Court says:

"Against each individual selected, sufficient case must be made out to show that he participated in the tort for which a verdict is had."

This rule if sound casts the burden on appellant to show affirmatively that appellee Bowerman participated or assented to the torts charged. It is not enough to let such a charge rest on assumption or conjecture. The statutory requirement should be complied with. We feel we are amply sustained in this contention by the ruling of the Court in *Warner v. Pennoyer*, 33 C. C. A. 222; 91 Fed. 587, and on pages 593 and 594 the Court states:

"As to all these losses, the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank, wrecked by

the misconduct of a cashier, could not be held accountable for all the losses. The court cannot decree upon conjecture."

There is not one word in the record showing that appellee Bowerman had any actual knowledge of any of the violations of sec. 5200 alleged, at the time they or any of them occurred, or that he ever ratified them, and hence he could not have participated in them or assented thereto. The only testimony that can even be claimed tends to show knowledge of the condition of the bank is contained in Exhibits 34 and 35, at pages 293 and 299 of the transcript, but nothing in these exhibits even hints at any knowledge of the violations charged.

The burden of proof is clearly on the appellant to bring the appellee Bowerman within the terms of sec. 5239. This is true not only on the general rules governing pleadings and evidence but the torts alleged must be brought home to Mr. Bowerman as to each alleged excessive loan. This we contend has not been done because the allegation in par. VII of the complaint, on pages 15 and 16 of the transcript, declares that he "willfully" failed to attend the meetings of the board, and that he "willfully" failed to discharge his duties in keeping himself informed concerning loans, and "willfully" failed to exercise proper or any authority as such director over said bank's affairs, and that he "willfully" permitted and allowed the said King and Lottridge to make such loans, and there are many similar allegations in other portions of the complaint. These allegations imply not only of the thing so *willfully* done, but a determination with a bad intent to do it or omit to do it. While making such charges of *willfully* doing things or not doing things, no proof is offered of

any bad faith on the part of Mr. Bowerman, and this we contend is not sufficient.

In this connection we call attention to the statement of the Court in the case of *Potter v. United States*, 155 U. S. 438; 39 L. Ed. 214, and on page 217 the Court states:

“Doing or omitting to do a thing knowingly and willingly implies not only a knowledge of the thing but a determination with a bad intent to do or omit doing.”

Hence proof of such knowledge implied in such allegation should have been made. If it were proper to make such allegations, it is necessary to prove them, and the proof being wholly lacking the liability of appellee Bowerman has not been established. Appellant has not shown that Mr. Bowerman participated in or assented to one alleged excessive loan or that any damage resulted from any action or omission or commission by him, thereby ignoring the rule laid down in *Wells v. Graves*, 41 Fed. 459, and on page 461, where the Court, in commenting on this very section 5200, alleged to have been violated by Mr. Bowerman, states: “It must be ascertained which of the defendants assented to each excessive loan.” The theory of appellant seems to be that because there was carelessness of the officers of the bank and of the loan committee in allowing overdrafts until they totalled an amount in excess of the 10 per cent of the capital of the bank, and a note was given therefor, therefore, the appellee Bowerman was liable without attempting to prove that he knowingly or in bad faith or fraudulently permitted such loans to be made. This is seeking a recovery on general allegations without proof of any act or knowledge of the alleged acts of commission. This theory cannot

meet the approval of courts, as indicated on pages 593 and 594 of *Warner v. Pennoyer*, 91 Fed. 587; 33 C. C. A. 222, where the Court states:

“As against two of the directors, the case for the complainant is predicated upon their failure to attend the semi-annual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow, because a director has failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank. In the present case, the board had provided for a reasonably vigilant supervision of the cashier. The cause of the losses was the neglect of those who had been appointed to keep watch of the discounts. Those directors who attended the meetings, and had no reason to suppose that the members of the discount and examining committees were neglecting their duties, are not responsible for the losses, which are solely attributable to such neglect. The directors who did not attend the meetings are in no worse category. What could they have done or prevented, exercising common diligence, if they had been present? A director who has failed to act is not liable for the thefts or shortcomings of the cashier, unless it appears, inferentially, at least, that his omission had some proximate relation to the losses.”

See also,

Hanna v. People's Nat. Bank, 71 N. Y. Supp. 1076.

And in *Williams v. Brady*, 221 Fed. 118, and on page

122, the Court states:

“There being no legal presumption of negligence and liability for loss against the defendants who did not attend the meetings of the board, one who undertakes to make them responsible should state facts sufficient to put them upon their defense.”

Failure to Attend Meetings.

The mere fact that appellee Bowerman failed to attend the meetings of the board is not sufficient proof of his liability. This fact may very properly be a circumstance to be considered, but it is not proof that he participated in or assented to these violations charged. Some light may be thrown on this condition in *Warner v. Pennoyer*, 91 Fed. 594. The record here shows that the cashier was under bond and the chairman of the committee on Loans and Discounts, N. I. Andrews, was paid \$100 per month for his services on that committee (pp. 136, 138, 164, 165, Tr.). Under these conditions there is no legal inference of liability against Mr. Bowerman merely because of his absence from meetings. The record further shows that, had he been present at such meetings, he would not have known of the alleged excess loans because these loans were accumulations of overdrafts (Tr. pp. 286 and 287) and were not direct loans. There is no attempt to show that Mr. Bowerman had any actual knowledge of any of these alleged excessive loans. Must not appellant bring home some participation in or assent to each of these loans to render Mr. Bowerman liable?

In *Wells v. Graves*, 41 Fed. 459, and on page 461, the Court states:

“Under the counts charging violations of sec. 5200 of the Revised Statutes in loaning to one person, firm or corporation amounts exceeding one-tenth of the capital stock, the condition of the accounts, and the nature of the indebtedness of the different parties named, must be investigated. Not only so, but it must be ascertained which of the defendants assented to each excessive loan, and the damage caused thereby to creditors must be properly traced out.”

There was no attempt to follow this rule in any particular as to Mr. Bowerman. They simply show he was absent from the meetings.

As stated by the trial court in his opinion herein (Tr. pp. 131-132): "A special committee on loans and discounts as well as an examining committee was maintained, and an additional safeguard, it was reasonable to assume, lay in the fact that the vice-president for whom he (Bowerman) seems to have a high respect, was being paid a compensation sufficient to obligate him to give a substantial part of his time to a supervision of the affairs of the bank." Had these committees and this paid official done their duty, there could have been no such violation of the statute as alleged was committed. This shows who participated in and assented to these excess loans, if any were made.

This view is emphasized by a statement in *Warner v. Pennoyer*, *supra*, 33 C. C. A. 222; 91 Fed. 593, as follows:

"We are of the opinion that only those directors including the president shall be held responsible for these losses who were members of the discount and examining committees. If these persons had performed their duties faithfully, while it cannot be said that there would have been nothing to criticize in the management of the bank, it may be reasonably inferred that the losses from the deals for the benefit of the Western Improvement Company would not have occurred. If the other directors were cognizant of the neglect of duty of these directors, the proof does not show it."

There can be no contention here that the proofs show that appellee Bowerman had any actual knowledge of, participated in, or assented to, a single excess loan unless a failure to attend the meetings of the board was such

gross negligence as to amount to knowledge constructively. We contend that the language of sec. 5239 implies that if the tort charged is an active one, is some positive action of the board, the appellant must show that appellee Bowerman actively, in the sense of knowingly, participated in or assented thereto. But the testimony wholly fails to show any such participation or assent on the part of Mr. Bowerman.

It is declared in *Mason v. Moore*, 4 L. R. A. (N. S.) 597, and on page 605, as follows:

“Participating and assenting both imply affirmative action of some sort as distinguished from mere silence and inaction.”

Emerson v. Gaither, 18 Atl. 26.

If the basis of the suit were non-action (which is not the case here), the appellant must show affirmatively that appellee Bowerman participated in or assented to such non-action, that is, we contend that a proper construction of such sec. 5239 is that where a board knowingly violates this banking act, this is a charge of an active violation, or if the board knowingly permits a representative of the bank to violate such banking act, this is a non-active violation of the act; therefore, if the board is charged with non-action, the proof of an inactive participation in or assent thereto would be consistent with the terms of the section, but in the case at bar appellant alleges a positive act of the board in violating the law, then attempts to hold Mr. Bowerman liable by proofs that he did not actively participate in such violation. We contend this is not sufficient. We are sustained in this contention, we feel, by the ruling of the court in *Chesbrough v. Woodworth*, 116

C. C. A. 465; 195 Fed. 875, where the Court on pages 880 and 881 states:

“When the thing criticized is the positive action of the board, plaintiff should affirmatively show that the selected defendant in some way participated or assented to this action; and when the foundation of the suit is the non-action of the board, and such wrongful non-action appears, that defendant’s individual responsibility rests upon the same considerations—i. e., it must appear that he participated in or assented to the wrongful inactivity, by failing to make reasonable personal efforts to induce the proper action.”

In the case at bar, the board is charged with a positive, knowing violation of the statute and the appellee is charged with the same positive and knowing violation of such statute. Now they offer proof that he actually knew nothing about it. This we contend is not sufficient. Some light may be thrown on this contention by a statement of the Court in *Movius v. Lee*, 30 Fed. 298, and on page 305, where the Court states:

“The complaint against them (the directors) is not that they acted negligently or carelessly in actually doing anything, but that they neglected to do anything. What they did not do, the omission to do which caused damage, was the restraint of Lee in what he did. So the real question is whether they are chargeable for the consequences of what he did, because they did not prevent it.”

This illustrates the case at bar. The board of directors is charged with knowingly and willfully violating the statute. Then the appellee Bowerman, one of the directors, is sought to be held because he did not prevent such violation, and the testimony of appellant shows that the reason, if any, why he did not prevent such violation by

others was because he knew nothing about it; not because he participated in or assented to such violation, but because he did not.

The contention of this prosecution seems to be that each director has to be responsible for the others under this statute. This is emphasized by the statement of the Court in the last above mentioned case (*Movius v. Lee*) on page 305.

“The body of directors of a national bank is charged with the supervision and management of its officers, and is bound to use as much diligence and care as the proper performance of these duties requires. * * * But this obligation does not appear to require every director to attend himself to every part of the corporate business, nor make each liable for every act done by any of them. They do not undertake each for the others.”

And on pages 306 and 307 of the same case, the following appears:

“He became director and is liable for all that he did as director, but he was not bound to attend every meeting of the directors. It is not part of the duty as a director to take part in every transaction which is conducted at a board meeting. His business or his pleasure may call him elsewhere, and it would be a most unheard of thing to say that if anything wrong was done at a board meeting, he being named among the directors, but not present, he is liable for what is done in his absence.”

And on page 307 the Court further states:

“There is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. * * *

“The measure of the duty of directors is frequently

and emphatically laid down, and is clear and plain; but it is nowhere adjudged that all must always act, or that they must not trust one another to act, or that any are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of the others."

There is not one word in the testimony in even Exhibits 34 and 35, found on pages 298 and 299 of the transcript, that appellee Bowerman ever had any actual knowledge of such alleged excess loans, or any of them, because the published statements admitted in evidence (Exhibits 29 to 23), as shown on page 293 of the transcript, were admitted in evidence "upon the condition that it be shown that defendant Bowerman had knowledge of such published statements." The condition was not attempted to be complied with, except by introducing Exhibits 34 to 35, found at pages 293-297 of the transcript, and on page 294 of the published statements, that Mr. Bowerman saw "was published under date of June 30, 1910," and not one of such published statements (Exhibits 29 to 33) refers to excess loans. And the trial court very properly refers to Exhibit 34 on page 129 of the Transcript as follows: "The letter itself (Ex. 34) furnishes no proof of a knowledge of excess loans."

Fraud or Bad Faith.

There is no charge of fraud or bad faith and not one word of testimony tending to show any fraudulent transactions or any connivance or conspiracy.

In *Briggs v. Spaulding*, 141 U. S. 132; 35 L. Ed. 622, which is probably the leading case on the questions at bar, it would seem that some such showing is necessary, for on the foot of page 669, the Court states:

“Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties.”

And on foot page 670 the Court further states:

“Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequences of omission on their part.”

In *Mason v. Moore*, *supra*, (4 L. R. A. N. S.), on page 606, the Court states the question clearly in these words:

“A director of a bank whose services are gratuitous,
* * * does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud.”

To hold appellee Bowerman liable simply on presumption or constructive notice of the tort charged would, it seems, be carrying the rule of constructive notice to an unreasonable extent, in the light of the positive language of sec. 5239, for this would be imputing knowledge to him which the testimony fails to show he had. This is indicated in *Briggs v. Spaulding*, *supra*, and on foot page 674, where the Court states:

“I know of no case, except *ex parte Brown*, which shows that it is the duty of a director to look at the entries in any of the books, and it would be extending

the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge of which is sought to impute him in this case."

Movius v. Lee, 30 Fed. 298.

Warner v. Pennoyer, 91 Fed. 587.

We had prepared in our preliminary brief to meet the question charged of accepting illegal dividends on the part of Mr. Bowerman, but as counsel seem to make no contention on this, we omit it from this brief.

There is not one word of testimony tending to show that any of the alleged losses resulted from the failure of Mr. Bowerman to attend the meetings of the board or from any other acts of omission or commission.

The rule is well stated in *Williams v. Brady*, 221 Fed. 118, and on page 122 the Court says:

"I conclude that, for the acts charged to have been done in pursuance of meetings where the directors attended, the defendants who did attend are sufficiently charged. But allegations that certain directors are liable because of 'unreasonable neglect and failure to attend' are not enough. What constitutes an unreasonable neglect and failure to attend meetings of directors? Not necessarily the opinion of the plaintiff. Surely there ought to be facts set forth from which the court can say that the conclusion of the pleader that there was unreasonable failure is well founded. There being no legal presumption of negligence and liability for loss against the defendants who did not attend the meetings of the board, one who undertakes to make them responsible should state facts sufficient to put them upon their defense."

If this rule of pleading is sound, then it necessarily follows that proof of such acts when alleged should be made.

Counsel by their second assignment of error, beginning at page 367 of the transcript, and on page 9 of their brief,

seek to hold the appellee Bowerman for the balance of about \$3800 not now collectible by the receiver, on the ground of a common law liability for failure to attend meetings of the board. The overdrafts then unpaid, portions of which the receiver alleges he is unable to collect, are itemized on pages 28 to 38, inclusive, of the transcript. The Court will notice that these alleged overdrafts were all made in the years 1910 and 1911, and there is no testimony showing that these parties were not fully responsible for these overdrafts when made. The trial court comments on this failure in the testimony, beginning on page 116 of the transcript, where the Court states:

"The receiver finds that overdraft accounts approximating \$3800 are uncollectible. There is no substantial proof on the proposition that numerous individuals to whom these overdrafts were allowed were at the time unworthy of credit; in other words so far as appears, if instead of accepting and paying the checks as they came in the defendant had taken ~~notice~~ *note* from the borrowers for equivalent amounts, there would have been no ground for complaint. The national banking law does not prohibit overdrafts."

This shows that even under the common law rule so earnestly invoked by appellant, there is no proof showing negligence in permitting such overdrafts when made, but appellant seeks to show that these overdrafts were improvident by showing that in 1915 the balances thereon could not be collected, as appears from the return on execution against Harry G. King, on page 190 of the transcript, and the return on execution against Ray Edwards, on pages 202-203 of the transcript, and the return on execution against Harry Brown on pages 215, 216 of the transcript, each of which returns was made in 1915.

While appellant alleges the excess loans as a specific violation of sec. 5200 of the Federal statute (par. V, p. 11 of transcript), he further contends that the overdrafts made from time to time comprising such excess loans were negligently made, but without any proof that those to whom such overdrafts were granted were not fully worthy of such credit by overdrafts at the time made. To illustrate: Take the alleged excess loan to one Harry Brown. While it is alleged (p. 22 of Tr.) that this loan was made January 2, 1911, being Exhibit 28, found at pages 287 and 288 of Transcript, still appellant's evidence (p. 286 of Tr.) shows that the overdrafts making up this loan, were commenced in 1908 and continued by overdrafts and various notes until all such notes and overdrafts were merged in the alleged note of \$6500 and the alleged note of \$6200, or \$12,750, as alleged on page 22 of the transcript; but the evidence shows that return on execution to enforce such amounts, was not made until February 25, 1915 (pp. 215-216 Tr.). This shows the importance of proof that this party was not worthy of credit when the numerous overdrafts were permitted, and, as suggested by the trial court, as above quoted. This applies with equal force to the other notes that were so made by overdrafts and alleged to have been loaned on a certain date.

While, as stated in *Mason v. Moore*, *supra*, and intimated in *Yates v. Jones Nat. Bank*, *supra*, that the Federal statute "does not preclude a liability at common law," still, when the right of recovery is based directly on a violation of a specific inhibition by the statute, then the statute, it would seem, would be the measure of liability for such violation. It is not a violation of the common law for a national bank to loan to one person in excess of

10 per cent of the capital of such bank, but it is prohibited by sec. 5200 of the Federal statute, hence we contend that the Federal statute is the measure of liability and not the common law, where the provision of the statute is violated. If this were not true, then of what purpose is the statute?

This question is referred to in *Yates v. Jones Nat. Bank*, 206 U. S. 158; 51 L. Ed. 1012, and on foot page 1014, in the following language:

“The frustration of the public policy embodied in the national bank system by the crippling of the usefulness of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the national bank act, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate.

“The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability. *Farmers' and M. Nat. Bank v. Dearing*, 91 U. S. 29; 23 L. Ed. 196, 199, and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability.”

The statement of the trial court, "Considering the nature of the wrongdoing charged, it is thought that these statutory provisions rather than the general rules of the common law furnish the measure of defendant's duty and responsibility," on page 112 of the Transcript, strikes the question squarely.

Jones Nat. Bank v. Yates, 139 N. W. 844, 1135.

There is a failure of proof even under the common law rule so invoked in two respects:

(a) There is no proof that such overdrafts were improvident;

(b) There is no proof that appellee Bowerman had reason to know that improvident loans were being made.

The trial court, on page 121 of Transcript, in referring to this feature states: "Upon the whole, I am inclined to the view that in extending credit up to the statutory limit, he acted with ordinary prudence." In this statement the Court was referring to the defendant Harry G. King, who was the cashier of the bank. If this is true as to Mr. King, then it must be doubly true as to the appellee Bowerman.

By a perusal of *Gibbons v. Anderson*, 80 Fed. 345, and *Rankin v. Cooper*, 149 Fed. 1010, cited by appellant, it will be observed that appellant does not bring himself within the rule announced in the cases so cited because in those cases, under the testimony there given, the Court fixed a time when, by reason of certain testimony, the directors should have taken notice of the condition of the bank; hence we contend that the trial court was right when he held that the liability of appellee Bowerman must

be measured by the terms of the statute, and hence the proof must show that he knowingly permitted the excess loans to be made and the proof should show that such overdrafts were improvidently made at the time they were made.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK R. McCORMICK, as Receiver of the FIRST
NATIONAL BANK OF SALMON, a Corporation,
Appellant,

VS.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE, and E. S.
EDWARDS, *Appellees.*

PETITION FOR REHEARING OR FOR MODIFI-
CATION OF THE ORDER OF THIS COURT.

*Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

RICHARDS & HAGA,
Solicitors for Petitioner and Appellee,
Guy E. Bowerman.

Filed *Residence, Boise, Idaho.*

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No. 2742.

United States
Circuit Court of Appeals
For the Ninth Circuit

FRANK R. McCORMICK, as Receiver of the FIRST
NATIONAL BANK OF SALMON, a Corporation,
Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS,
GEORGE BUCK, GUY E. BOWERMAN, FRED
G. HAVEMANN, JOHN LOTTRIDGE, and E. S.
EDWARDS, *Appellees.*

PETITION FOR REHEARING OR FOR MODIFI-
CATION OF THE ORDER OF THIS COURT.

*Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

RICHARDS & HAGA,
Solicitors for Petitioner and Appellee,
Guy E. Bowerman.

Residence, Boise, Idaho.

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*Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

*To the Honorable, The United States Circuit Court
of Appeals for the Ninth Circuit:*

Your petitioner, Guy E. Bowerman, one of the
appellees in the above entitled cause, respectfully
petitions this Honorable Court to grant a rehearing
in said cause, and your petitioner especially claims
error in the decision filed herein in the following
particulars:

1. This Honorable Court erred in reversing the Trial Court and in directing final judgment to be entered against appellee Bowerman, and in not determining this appeal on the theory on which the trial was had in the lower court, because

(a) The only question in the trial of the case in the lower court was the question of statutory liability, while this Court held Bowerman liable for an alleged violation of his common law duty;

(b) Although the pleadings may be broad enough to raise the issue of liability under the rules of common law, yet there was not one scintilla of evidence introduced on such issue;

(c) No opportunity has ever been given this appellee to introduce any evidence on the question of a common law liability, this question not having been raised in the lower court;

(d) The entering of such judgment for approximately \$40,000.00 is taking the property of Bowerman without due process of law, he having had no opportunity to be heard on the question of the alleged violation of his common law duty; and

(e) The record shows that the question of the common law liability of appellee Bowerman was raised for the first time on this appeal.

2. This action was tried in the Lower Court on the theory that appellee Bowerman was liable to the bank under the provisions of the United States Revised Statutes, Sections 5147, 5200 and 5239 for knowingly permitting a violation of the National Banking Act, and not on the theory that he had been

negligent in administering the affairs of the association, and this Honorable Court therefore erred in decreeing that the appellee Bowerman was liable to the Bank under the rules of the common law for all damages suffered because of the excess loans to the Pollards, Brown and Salmon Lumber Company, because an action can not be tried on one theory in the lower Court and reversed on another theory in the Appellate Court.

3. The case having been tried in the lower Court on the theory of a statutory liability only on the part of the appellee Bowerman, and there being no evidence that Bowerman knowingly violated or knowingly permitted to be violated any of the provisions of such statutes and without such knowing violation there can be no liability on the part of appellee Bowerman to the Bank on the theory on which this case was tried in the lower court, this Honorable Court therefore erred in reversing the decree of the lower Court and in directing final judgment against the appellee Bowerman.

4. The bill was dismissed as to the appellee Bowerman without the introduction of any evidence in said cause on his behalf, and this Honorable Court therefore erred in directing final judgment against him and in not remanding the cause and permitting appellee Bowerman to introduce evidence on his behalf in support of the issues made by his denial that he was a director of the Bank subsequent to the 1st day of July, 1910 (p.41 Record), and by his affirmative defense on page 52 of the record that he had

resigned as a director of the Bank on or about the 1st day of July, 1910.

5. From an examination of the record, it is clear that the case was not fully developed in the Trial Court because there were issues made by the pleadings upon which there was no evidence or findings by the lower Court, and this Honorable Court therefore erred in directing final judgment against the appellee Bowerman and in not remanding said cause for a new trial, because a new trial should always be granted where there are material issues upon which there is no evidence or findings.

ARGUMENT.

Upon reading the Bill (pp.7-28 of the record) it seems clear that it is bottomed on a violation of the Federal Statutes, as there are only two places in the Bill (par. VII and XI) that do not relate wholly to a violation of such statutes, and not only this but the record shows, as hereinafter pointed out, that the case was tried by counsel for appellant, counsel for appellee Bowerman, and by the lower court on the theory of a statutory liability only, which involves the rule that a cause having been based and tried on that theory should not on appeal be determined on a wholly different theory.

This rule is well stated in *Matheison v. St. Louis & San Francisco Ry. Co.*, 219 Mo. 542, 118 S. W. 9, an action for damages under a statute in which, after a trial of the case, it was held on appeal that the complaint did not state a cause of action under such

statute, and the court in holding that there could not be a change of theory in the Appellate Court where counsel for appellants contended that the complaint and the record would support a judgment under the rules of the common law, says:

“Counsel for respondent seeks to avoid the result of the conclusions reached in paragraph one of this opinion (that the petition did not state a cause of action under the statute) by insisting that the petition states a good cause of action under the common law, and that he is entitled to recovery independent of the statute pleaded.

“In our opinion, that contention is untenable; and it is apparent from reading the petition that the suit is bottomed upon the statute, and no attempt whatever was made to state a cause of action under the common law. The record also shows that the case was tried upon that theory, and he should not be permitted to change front in this court.”

And also in *San Juan Light & T. Co. v. Requens*, 224 U. S. 89, 97, 56 L. Ed. 680, 683, an action that was tried on one theory in the lower court and in which it was urged on appeal that the case should be reversed on a different theory, the court says:

“Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.”

This case was based and tried upon the theory of a violation of Sections 5147, 5200 and 5239 of the Revised Statutes of the United States, and while it may be, because of the allegations of general negligence in paragraphs VII and XI of the Bill as above stated, that it justifies the construction placed upon it by this Court, yet the whole record clearly shows that the appellant, the plaintiff, was relying upon the alleged violation of the statutes relative to National Banks, and that the motion of appellee Bowerman to dismiss the Bill as against him (p. 319, record) shows that he was also trying the case on the theory of a statutory liability, and knowingly permitting the officers of the Bank to violate the National Banking Act, and the decision of the lower Court in dismissing the Bill as to appellee Bowerman (p. 132, record) shows that so far as the Court was concerned the case was tried to it on the theory of statutory liability only.

On page 11 of the record, appellant in his Bill charges that the defendants Bowerman and others, and each of them

“knowingly permitted and assented to the making of loans by the officers, agents and servants of the First National Bank of Salmon far in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby large sums of money belonging to the stockholders and depositors of said Bank became wasted and lost.”

This is the sum and substance of the whole charge against the defendants excepting that allegation heretofore mentioned in paragraphs VII and XI and all the proof and evidence was directed to the support of such charge.

The Court was clearly of the opinion that the plaintiff was relying upon the charge of a knowing violation or knowingly permitting a violation of the statutory duty, and not a violation of the common law duty.

After reciting on page 111 of the record that there are five general charges of misfeasance, the Court then quotes from Sections 5147 and 5239 R. S. U. S., and on page 112 of the record says:

“Considering the nature of the wrongdoing charged, it is thought that these statutory provisions, rather than the general rules of the common law, furnish the measure of the defendants’ duty and responsibility.”

The Court then proceeds to discuss the liability of the defendants for purchasing the business of Langsdorf and Company because of which purchase it was contended that there had been a violation of the National Banking Act, since there were certain loans taken over which were in excess of loans permitted to be made to any one person under the provisions of the National Banking Act, but the Court, in holding that there was no liability, on page 113 of the record says:

“The mere fact that as a part of the assets so purchased there were loans which in amount exceeded the limit to which National Banks are confined, is quite immaterial (citation). Assuming that such loans were retired when they fell due, *there was no semblance of a violation of the National Banking Act.*”

Clearly, had the Court been considering the liabilities of the defendants from the standpoint of negligence in administering the affairs of the Bank, it would not have said in holding that there was no liability because of the purchase of Langsdorf and Company “there was no semblance of a violation of the National Banking Act.”

The appellants further contended that the appellees were liable for making a dividend on the 1st day of July, 1910, but the Court again, in holding that there was no liability on account of this dividend, first says on page 114 of the record:

“If the defendant is liable at all in this action, he is liable for the whole amount of this dividend on the theory that disregarding the obligations of his trust, *he knowingly violated the provisions of the law.*”

And further says on page 116 of the record:

“I am satisfied that he did not knowingly or intentionally violate the law.”

Then, again, the Court in considering the charge that overdrafts had been made in violation of the By-Law of the Bank, says:

“The National Banking Law does not prohibit overdrafts.”

If it had appeared to the Court that the case was being tried on the theory of general negligence, it would have been immaterial whether the National Banking Law does or does not prohibit overdrafts.

The greater part of the evidence tending to show negligence is to the effect that loans in excess of the amount permitted by statute were made to a number of individuals and the Court again, in discussing these excess loans, says that:

“These loans, therefore, in so far as they exceeded the amount were in violation of the statute.” (p. 120, record.)

The Court, in discussing the liability of Andrews after having concluded that the appellee King was liable for knowingly violating the law, says (p. 122, record):

“While the defendant Andrews participated less actively than King in the management of the Bank, it is thought that his legal responsibility is substantially the same. *The penalty for knowingly permitting a violation of the law is not less than for knowingly violating it.*”

So far as Andrews is concerned, general negligence is not once mentioned in the decision of the lower Court.

The Court, after discussing to some extent the failure of appellee Bowerman to attend the meetings of

the Board of Directors, and if he was not a director as is alleged in his answer to the complaint after the 1st day of July, 1910, it is immaterial whether he ever attended a meeting of the Board of Directors of the Bank so far as this action is concerned, on page 129 of the record, says:

“Did he (Bowerman) *with knowledge* remain silent and inactive when he should have spoken and made active opposition and *did he thus knowingly assent to or knowingly permit the loans to be made.*”

And again on page 130 of the record, the Court, after discussing the evidence to the effect that these excess loans on which this Court has held that the appellees are liable did not appear upon the discount and loan register required to be presented to the Board of Directors at their monthly meeting, and after saying that such a system of bookkeeping, if not designed to conceal, would in effect enable officers to make excess loans and to withhold knowledge from the Directors, unless they made an examination of the accounts of each individual depositor, says:

“Doubtless, appreciating the strain at this point, counsel for the plaintiff sought to show such a course of business in allowing excess loans as to give rise to the inference that all the Directors *must have had knowledge thereof and assented thereto.*”

And in finally dismissing the Bill as to appellee Bowerman, the Court, on page 132 of the record, says:

“It cannot be said of him (Bowerman) that he knowingly permitted the loans to be made.”

Clearly, if it had been urged in the lower Court that the defendants, and especially the appellee Bowerman, was liable to the Bank for negligence in administering the affairs of the Bank, and therefore under the rules of the common law, Judge Dietrich would have in some manner passed upon this question. But nowhere in the whole decision is there any discussion in any manner of the liability of the defendants or any of them for general negligence, but the whole decision turns upon the question of a knowing violation or knowingly permitting a violation of the National Banking Act. It is incredible to think that Judge Dietrich would not have in some manner passed upon the question had it been urged in the lower Court.

Counsel for appellant, after introducing in evidence the minutes of the Bank showing the by-laws in question and the election of directors and also the oaths of the officers, and there is not one bit of evidence to the effect that appellee Bowerman was elected a director in January, 1911, nor is his oath of office for that year in evidence, his last oath of office being the one taken in January, 1910, opened his case by asking the following question (p. 154 record), in connection with the buying of the Langsdorf and Company bank:

“Now please read, Mr. Biscoe, the loans so taken over which were in excess of \$5,000.00 to any one individual, or firm or company.”

to which question objection was made by counsel for appellee Bowerman that they were not charged with taking over such excess loans, and Mr. Budge, counsel for appellant, on the same page says that the purpose of asking such question was

“To show the date when the mismanagement commenced and as charging the *defendants with knowledge*, either actual or constructive of the mismanagement of the Bank. * * * and just simply for the purpose of showing that the Bank here was making *loans in excess of its statutory limit*, and thereby mismanaging the bank.”

This clearly shows that counsel was relying upon a knowing or knowingly permitting a violation of the National Banking Act, and the Court, after sustaining the objection to the question, says on page 156:

“You understand that I do not sustain this objection upon the ground that you cannot introduce evidence of similar acts to those charged, *for the purpose of showing intent and knowledge*, but I do not conceive that the taking over of the assets of this bank would involve transactions of a similar nature. I see nothing wrong in taking over the assets of this Company, even though those assets may have involved loans in excess of \$5,000.00.”

From an examination of pages 158 and 159, it is clear that both counsel for appellant and the Court were assuming that the action was one for violation of the National Banking Act, and on page 157 counsel for plaintiff introduced in evidence a letter from the Comptroller of the Currency to the First National Bank showing that these loans taken over from Langsdorf and Company were excess loans and finally, on page 162 of the record, a large number of loans which were in excess of the amount permitted by law was read into the record, and, as stated by counsel for plaintiff, the purpose of such was to show that defendants had either actual or constructive knowledge of the violation of the National Banking Act. And again, on pages 219, 220 and 221, it is clear from reading the remarks of counsel for both plaintiff and appellant, and the testimony of the witness, that counsel for appellant was relying upon a violation of the statute by making excessive loans, and on page 290 of the record counsel for plaintiff or appellant asked leave to amend his Bill to show that a loan of \$6,250.00 was an excess loan, and at the close of appellant's case appellee Bowerman, through his counsel, made a motion to dismiss the Bill as against him in the following words (p. 319 record):

"I move to dismiss the Bill as to the defendant Bowerman because they have not in anywise brought him within the terms of Section 5239 of the Revised Statutes of the United States as interpreted by the Courts of the United States. I can present it very briefly."

This motion to dismiss is very much qualified, clearly showing that counsel for appellee had assumed that the case had been tried on the theory, so far as appellee Bowerman was concerned, that he had knowingly permitted a violation of the National Banking Act. The Court makes no comment of any kind on this motion, neither does counsel for appellant. It is inconceivable that had the action been tried on any other theory than on a theory of a violation of the National Banking Act, that both the Court and counsel for appellant would have in no manner commented upon qualification of the motion to dismiss of counsel for appellee Bowerman, and the Court, on page 132 of the record, in dismissing the Bill as to Bowerman, says:

“But upon the whole, I am unable to conclude that he was grossly negligent, or that he had such information that it can be said of him that he *knowingly permitted* the loans to be made.”

If counsel for appellant had been relying upon a violation of the common law duty, surely the Court would in some manner have discussed this question as to appellee Bowerman, rather than discussing the question as to whether the evidence was sufficient to show that appellant had made a case against Bowerman by showing that he had knowingly permitted the statute to be violated.

There are many other instances in the record which tend to show that the action was tried on the

theory of a knowing violation of the statute or knowingly permitting the National Banking Act to be violated so far as appellee Bowerman is concerned, and standing alone there may be some evidence which would tend to support a theory that the case had been tried as for liability by reason of general negligence, but when the whole record is considered, the only conclusion that can be drawn therefrom is the one that the action was tried in the lower Court on the theory that appellee Bowerman had knowingly permitted the National Banking Act to be violated and on this theory only.

When an action has been tried in the lower Court on one theory, the decree of such Court cannot be reversed in the Appellate Court on a different theory. The injustice of permitting a party to an action to try his case on one theory in the lower Court and then when the action has been dismissed as to a defendant to permit such party to appeal and contend on appeal that the record will support a reversal of such decree on an entirely different theory, is so clear that it is scarcely necessary to cite authorities to that effect, and all the authorities uniformly hold that a party cannot make one case by his Bill in the lower Court and another by it in the Appellate Court.

In *United States v. Kettenback*, 208 Fed. 209, 213, 125 C. C. A. (9th Circuit) 409, it was contended by complainant on appeal that the decree should be reversed and the patents declared fraudulent and void on the single ground that the evidence established the fact that the entrymen applied to purchase

the lands described in their entries for the purpose of speculation, while in the Lower Court the case was tried on the theory that at the time the entrymen made application to purchase the lands described in their entries they had made agreements with certain persons by which the title to the lands which they were to acquire from the United States should enure to the benefit of persons other than themselves; and the court in holding that the decree should not be reversed on appeal on a theory on which the case was not tried below, although the record would support a reversal on a theory on which case was not tried, says:

“Whether this charge was true or not was the question at issue in the court below, and to this issue (argument that title should enure, etc.) the voluminous testimony we find in the record was directed, and is now before the court for the purpose of determining these appeals. It is this question, and this question alone, we must determine with respect to the 61 patents assailed in these cases.”

This court, in line with all other courts, in its decision in the Kettenback case, has therefore held that, although the record will support a reversal of a decree on a theory on which the case was not tried in the Lower Court, yet the decree of the Lower Court in order to be reversed by the Appellate Court must be reversed on the same theory on which the action was tried.

In 3 Corpus Juris, 718, Sec. 618, the author in dis-

cussing the subject of changing the theory of the case on appeal, says:

“One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review.”

And again in 3 Corpus Juris, 725, the author says:

“The rule applies also to actions or proceedings under statutes, so that, where an action or proceeding is treated in the trial court as having been brought under a particular statute, that theory will be adhered to on appeal. *And where an action is tried as based on a statute, it will not be treated, on appeal, as an action at common law.* (Our italics.)

In Illinois R. R. Co. v. Eagan, 203 Fed. 937, 939, 122 C. C. A. 239, the court said:

“Nor is it permissible for one who tries his case on one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory.”

In *Conrad v. Hausen*, 171 Ind. 43, 85 N. E. 710, 713, the court in a case tried on the theory that the petition presented to the Lower Court was drawn under one statute, and where it was urged on appeal that the sufficiency of the petition should be determined by the provisions of another statute, says

“It is true, also, that when a case has been tried upon a certain theory in the trial court that theory must be adhered to on appeal.”

In *Lesser Cotton Co. v. St. Louis I. M. & S. Ry. Co.*, 114 Fed. 133, 144, 52 C. C. A. 95, the court says:

“It is too late for the plaintiff’s, after the trial of the case upon this theory, to challenge in the appellate court the ground upon which they sought a recovery, and to insist that the defendant was liable for a fire set within the barn, because in the trial of the real issue which they presented some testimony crept into the record, upon which they asked no instruction, and to which they do not seem to have called the attention of the court at the trial, which might have warranted a recovery on account of a fire set within the barn. One may not try a case upon one theory, and then reverse the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below. *Insurance Co. v. Frederick*, 58 Fed. 144, 149, 7 C. C. A. 122, 127, 128, 19 U. S. App. 24, 34; *Walker v. Collins*, 59 Fed. 70, 72, 8 C. C. A. 1, 3, 4, 19 U. S. App. 307, 311, 312; *Speer v.*

Board, 32 C. C. A. 101, 88 Fed. 749, 753; Burbank v. Bigelow, 154 U. S. 558, 14 Sup. Ct. 1163, 19 L. Ed. 51; Railroad Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; Horne v. George H. Hammond Co., 18 C. C. A. 54, 71 Fed. 314."

In Missouri, *K. & T. Ry Co. v. Wilhoit*, 160 Fed. 440-3, the Court says:

"We must, therefore, give effect to the settled rule that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review. *Epperson v. Postal, etc. Co.*, 155 Mo. 346, 50 S. W. 795, 803, 55 S. W. 1050; *Central Vermont R. R. Co. v. Soper*, 8 C. C. A. 341, 351, 59 Fed. 879; *Lesser Cotton Co. v. St. Louis, etc. Co.*, 52 C. C. A. 95, 114 Fed. 133; *Baker v. Kaiser*, 61 C. C. A. 303, 126 Fed. 317; *Chicago, Milwaukee & St. Paul Ry. Co. v. Voelker*, 65 C. C. A. 226, 233, 129 Fed. 522, 529, 70 L. R. A. 264; *Cook v. Foley*, 81 C. C. A. 237, 248, 152 Fed. 41, 52; *New York etc. Co. v. Estill*, 147 U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; 2 Cyc. 670."

In *Benton Land Co. v. Zietler*, 182 Mo. 251, 70 L. R. A. 94, 98, the court says:

"The case was not tried in the circuit court upon any such theory, and no such issue was raised in that court, and cases must be tried in

this court upon the same theory and issues upon which they were tried in the lower court.”

In *State ex rel Holgate v. The Superior Court of Pierce County*, 52 Pac. 522, 19 Wash. 114, the court says:

“And we have uniformly held that we would determine a case here on the theory on which it was tried below.”

In *Walker v. McNeil*, 17 Wash. 582, 50 Pac. 518, 521, the court says:

“It would be at variance with the view often expressed by this court to consider a cause brought here upon another or different theory than that presented to the trial court.”

In *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302, 74 Pac. 470, the court says:

“And this court has uniformly held that causes here will be tried on the theory upon which they were tried in the court below.”

On appeal a case cannot be heard on a theory on which it was not presented in the trial court. See: 1. Dec. Digest, Appeal and Error, Section 171 (1), and particularly the following cases:

Brockenbrough v. Champion Fibre Co., 176 Fed. 840, 100 C. C. A. 310.

Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23, 106 C. C. A. 225.

Ehmen v. City of Gothenburg, 200 Fed. 564,

- City of Charlotte v. Atlantic Bitulithic Co.,
228 Fed. 456, 143 C. C. A. 38.
- Wetzel & T. Ry. Co. v. Tennis Bros. Co., 75
C. C. A. 226, 145 Fed. 458, 7 Ann. Cas. 426.
- Durfee v. Harper, 22 Mont. 354, 56 Pac. 582.
- Standard Furniture Co. v. Anderson, 38
Wash. 582, 80 Pac. 813.
- Overstreet v. Citizens Bank, 12 Okla. 333, 72
Pac. 379.
- Neilsen v. Northeastern Siberian Co., Ltd.,
40 Wash. 194.
- Burbank v. Bigelow, 19 Fed. 51, 74 U. S. 106.
- Albany Perf. Wrap. Paper Co. v. John Hoberg
Co., 109 Fed. 589.
- Roanoke Gas Co. v. City of Roanoke, 88 Va.
810, 19 S. E. 665.
- Farmers & Merchants Bank v. Zook, 138 Mo.
App. 603, 113 S. W. 678.
- Stamper v. Venable (Tenn.) 97 S. W. 812.
- Industrial Mutual Indem. Co. v. Thompson,
104 (Ark.) S. W. 200, 10 L. R. A. (N. S.)
1064.
- Estate of McVay, 14 Ida. 56, 93 Pac. 28.
- Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220.
- Oclitic Stone Co. v. Ridge, 169 Ind. 639, 83
N. E. 246.
- Harris v. First Nat. Bank of Bokchito, 21
(Okl.) 189, 95 Pac. 781.
- Stratton Cripple Cr. M. & D. Co. v. Ellison,
42 Colo. 498, 94 Pac. 303.
- Morrison v. Rochl, 114 (Mo.) S. W. 981.

From what has been stated, it is clear that the attorneys for the parties to this action and the Lower Court tried this action on the theory that the defendants were liable to the Bank for a knowing violation or knowingly permitting a violation of the law. As far as appellee Bowerman is concerned, there is not one iota of evidence that he knowingly violated the provisions of the statute in any manner, nor is there any evidence that he knowingly permitted the other defendants to violate the statutes, nor is there any evidence in the case that he was a director after the 1st day of January, 1911, and there is an issue in the case that he had resigned as a director of the Bank on or about the 1st day of July, 1910, subsequent to which date practically all of the loans were made from which losses were sustained and of which appellant complains.

The attorneys for appellant for the first time on appeal assign as error that the Trial Court erred in not holding the appellee Bowerman liable for failure to perform the common law duty to be honest and diligent. At the close of plaintiff's case, appellee Bowerman, through his attorney, moved for a dismissal of the bill as to him for the reason that plaintiff had not made out a case against him which would bring him within the terms of Section 5239 R. S. U. S. as construed by the courts of the United States. The Court made no comment upon this motion at that time, other than stating that he did not like to pass upon the question without giving it some consideration. Neither did counsel for appellant

make any comment upon it. He should now be estopped to come into this Court and raise the question that the appellee is liable to the Bank for failure to perform his common law duty, when such non-action on the part of the appellant and his counsel resulted in a failure of the appellee Bowerman to put in any evidence in support of his defense to the action, and clearly, if appellee Bowerman can introduce evidence to support the defense set up in the action, such evidence would be a complete bar to any recovery against this appellee by appellant, for the reason that he cannot be chargeable with acts of the other directors of the Bank when he was no longer connected with the Bank.

As we have already shown, the theory of the case cannot be changed for the first time on appeal and all the authorities are uniform to that effect, and therefore the decree of the lower Court, so far as it affected appellee, Bowerman, should be affirmed for the reason that there is no evidence which in any way tended to show that he knowingly permitted any of the provisions of the statute to be violated, nor does this court in its opinion in any way intimate that there is evidence sufficient to warrant the reversal if the complaint is construed as charging a violation of the National Banking Act, as it was construed both by the Court and counsel for the parties to the action in the trial of the case.

This Court, in its decision, held that appellee Bowerman was liable to the Bank under the rules of the common law for failure to perform his duty to be

honest and diligent in managing the affairs of the Bank (pp. 8 and 15 of the Opinion), and in so holding, departed from the theory on which the case was tried in the lower Court and adopted a theory of liability which was urged by appellant for the first time on appeal. The question whether appellee Bowerman was guilty of negligence in acting as a Director of the Bank is a question of fact upon which he has had no opportunity to be heard, because this question, on the theory on which the case was tried in the lower Court was not in issue. Had such been the issue, the appellee Bowerman might well have introduced his evidence in support of his defense, rather than making his motion to dismiss the appeal as he did, which motion so far as a statutory violation is concerned is upheld by this Court and the Trial Court.

The issues as to whether plaintiff was negligent in managing the affairs of the Association, or whether he knowingly permitted the National Banking Act to be violated, are so radically different, that justice demands that the case in the Appellate Court be heard upon the same theory on which it was tried in the lower Court, for the reason that where it is urged for the first time upon appeal that the action is on one theory, rather than the one on which it was tried appellee has had no opportunity to be heard on such theory on which the case was not tried.

This Court, however, without passing upon the question whether the motion was rightfully granted upon the theory on which the case was tried, now holds that the bill is broad enough to charge a viola-

tion of the common law duty, to be honest and diligent (p. 8 of the Opinion), and that appellee Bowerman was guilty of "such inattention to duty which was imposed upon him of exercising a reasonable supervision over the conduct of those in charge of the Bank that he too is liable to the same extent as are King and Andrews, and "that the liability of defendants King and Andrews, being for gross mismanagement, should have been measured in accordance with the rule of the common law, rather than solely according to the statute." But this question of *inattention* to duty was not the issue in the case so far as Bowerman was concerned, but the sole issue was whether he had knowingly permitted the National Banking Act to be violated, and it is now unjust to reverse the decree against him on the theory that a case has been made out against him because of inattention to duty imposed upon him.

And again this Court, with only the plaintiff's side of the case before it, directs the lower Court to enter judgment against Bowerman for all loss to the Bank, regardless of the question of proximate cause of the loss and regardless of the fact that the case was only partially developed and that no evidence on the part of appellee Bowerman has been introduced, and that there are issues (that appellee Bowerman was not a director of the Bank at the time of the loans charged in the bill from which losses resulted were made) made by the pleadings upon which there is no evidence, and no findings. Under such circumstances, where the Trial Court has held that the bill will

be dismissed because a case was not made out against Bowerman on the theory on which it was tried, it should not be held on reversal of such an order by the Appellate Court that the appellee is not entitled to be heard on his defense which are issues on the pleadings.

In *Allen v. Parmalee*, 142 Fed. 354, 363, such a contention was made where at the close of plaintiff's case defendant moved for a dismissal, which motion was granted, but the court in reversing the order of dismissal and granting a new trial, says:

"It thus appears, in our opinion, that the Circuit Court erred in instructing the jury to find for the defendants, and that as the case then stood the court should have instructed the jury to find for the plaintiffs. The counsel for the plaintiffs in error ask us to reverse the judgment of the Circuit Court and to render judgment here in favor of the plaintiffs for the land in controversy. They urge that, if the defendants have any color of claim of title, they declined to show it when they had the opportunity and might have done so, without in any degree compromising their rights, so that the case on all of the existing facts pertinent thereto might have been adjudicated, and that to permit another trial with opportunity to introduce such evidence as they may have, if any, is to tolerate experimenting with the court by a motion to instruct without introducing evidence, and thus to bring about delay, cost, expenses, and trouble incident to two

trials and two appeals, in case the judgment of this court should not be in favor of the defendants. There is much force in what they suggest, but we are not willing to go that far in this case. Beside the general issue submitted in the technical plea of not guilty, various of the defendants, if not all of them, plead the statute of limitation as to specific portions of the land. See *Hodges v. Easton*, 106 U. S. 408, 413, 1 Sup. Ct. 307, 27 L. Ed. 169.

“The judgment of the Circuit Court is reversed, and the case is remanded, which directions to award a new trial and proceed therein according to law and following the views herein expressed.”

Under these facts, clearly Bowerman, if this Court should hold in view of the allegations in Paragraphs VII and XI of the bill that the issue of negligence was an issue in the case, which it is not as we contend, because of the theory on which the case was tried in the lower Court, is entitled to a new trial to have the question of his negligence and the question whether he was a director at the time the loans were made passed upon in the light of all the evidence. Even if it were admitted, which it is not, that Bowerman was a Director up to the time the Bank closed its doors, still it is a question of fact whether his failure to attend meetings of the Board of Directors is the proximate cause of the loss. He may be able to show that, regardless of any acts he might have done,

King, Andrews and Lottridge might have made the loans from which the loss resulted.

The motion of appellee Bowerman to dismiss the bill was made in good faith, and the motion was sustained by the Trial Court, and so far as appears from the opinion in this case with reference to the issue of his knowingly permitting the statute to be violated, that order of the lower Court still stands and has been acquiesced in by this Court. Under such circumstances, justice demands that at least a new trial be granted.

In the *City of St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 104, 37 L. Ed. 380, 385, where all the facts had been found by the Trial Court, which is not the case here, the appellant only having presented his side of the case, the appellate court, in granting a new trial, says:

“It is unnecessary, however, to consider these matters at length, for on a new trial the facts in respect thereto can be more fully developed. It is true that in cases tried by the court, where all the facts are specifically found or agreed to, it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. *At the same time if for any reason justice seems to require it, the court may simply reverse and direct a new trial.* Indeed, this has been done, under special circumstances, in cases where there were no findings of facts or agreed statement, or where that which was presented was obviously defective.” (Our italics.)

In *Kossuth Co. State Bank v. Richardson*, 141 Iowa 738, 118 N. W. 906, an action in equity to foreclose a mortgage, the Court says:

“Ordinarily a reversal upon hearing *de novo* terminates the litigation, the opinion indicating the character of the decree to be entered; but *whenever essential to effectuate justice an appellate tribunal may remand to the trial court for such further proceedings as the circumstances of the case require.* * * * The authority of this court in its discretion to remand for introduction of additional testimony cannot be doubted.” (Our italics.)

The courts, even in equity cases, have uniformly held that where there were issues in the case upon which there was no evidence, and even in cases where a non-suit had been granted at the instance of the appellee, a new trial should be granted.

In *Shetler v. Stewart*, 133 Ia. 320-5, 110 N. W. 582, an equity case to quiet title to land in which the defendants moved to strike certain evidence of plaintiff, and on such motion being granted moved to dismiss the case, which latter motion was granted, the court on rehearing says:

“Now, if no further investigation were allowable, the effect of the reversal in this court would be to leave the plaintiff with a *prima facie* case made out, while the defendants would be barred from bringing forward the matters pleaded in defense by them. Such a result we think ought

not to obtain. True, as the case was in equity and therefore triable *de novo*, in this court, defendants might have gone on, and in the face of the ruling in their favor introduced their evidence. But their failure to do so is not wholly inexcusable under the circumstances. We think the case should be remanded for further hearing and trial, either party to have the right to bring into the record such further evidence as they may be advised is material and competent. This is the proper practice."

In *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159, a law case in which a non-suit was granted and the plaintiffs appealed, it was held that on reversal a new trial should be granted.

In *Massey v. Rae*, 18 N. D. 409, 121 N. W. 75, an action to set aside a deed as fraudulent where at the close of plaintiff's case a motion to dismiss was granted, it was held that a new trial should be granted under a statute providing that the Supreme Court could grant new trials in furtherance of justice.

In *Robson v. Hamilton Co.*, 41 Ore. 239, 69 Pac. 651, 653, the court in remanding an equity case for further proceedings where defendant had failed to introduce any evidence because of a ruling excluding evidence of plaintiff, and a motion of defendant to dismiss at the close of plaintiff's case being granted, the court says:

"Suits in equity are tried anew on appeal, and a final decree is usually rendered in this court,

and a cause should not be remanded to the lower court for further consideration unless necessity demands it. It was incumbent upon the defendants to present their testimony when they had an opportunity, but their failure to do so was evidently induced by a reliance upon the court's excluding competent evidence, to the introduction of which their objections were sustained; and, assuming this to be so, the cause will be remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion."

In *Baker v. City of Akron*, 145 Ia. 485, 122 N. W. 926, 30 L. R. A. (N. S.) 619, a case tried to the court as in equity, where the defendants had tried the case upon the theory of non-liability, the court, in granting a new trial, said:

"We shall not undertake on the appeal to fix the amount of plaintiff's damage. The case was not tried with any great degree of care on this issue, for the evident reason that defendants were proceeding on the theory of non-liability. For this reason, we shall remand the case for a retrial upon the issues as to the amount of damages to which plaintiff is entitled, and for further proceedings not inconsistent with this opinion."

In the case at bar, the appellee Bowerman moved to dismiss his appeal for the reason that a case had not been made against him on the theory on which the action was tried and failed to introduce any evidence. But in the *Baker* case certain evidence on the part of

the defendants had been introduced, still the court stating that the defendants relied upon the position that there was no liability and had not introduced any evidence in support of their defense with any degree of care, remanded the case for a new trial. Petitioner's case is clearly a much stronger case than the Baker case, for the reason that the appellant should have spoken when the motion was made if he was contending that the action was one for violation of the common law duty to be diligent, rather than an action for permitting the statute to be knowingly violated.

In *Gaither v. W. A. Gage & Co.*, 82 Ark. 51, 100 S. W. 80, an action to quiet title to lands where the case had not been fully developed and the bill was dismissed and the complainants appealed, the court says:

"The decree must be reversed as to both these tracts of land, but, as the case was not fully developed below, we do not think it would be just to direct a decree in favor of appellants. The learned Chancellor and counsel for appellees were evidently misled by the change in the pleading after the filing of the several answers, whereby the lands were alleged to be in the possession of appellees, though the petition had originally alleged that the lands were wild and unimproved. It is apparent that the case was tried below upon the theory that the lands were unimproved and unclosed. It would therefore be unjust not to give an opportunity to develop that fact by proof."

In *Wagner v. Arnold*, 76 Ark. 162, 88 S. W. 852, an action to quiet title to lands where the defendant appealed from the decree against him, the trial court having failed to make a finding on an issue made by him, it was said on appeal:

“Inasmuch as it appears that the lower court did not pass upon and determine whether this claim of appellee to south half was superior to the title of appellant we will remand cause as to that claim, with directions to lower court to proceed, if the plaintiff so desire to pass on that issue.”

In *Perry v. Blakey*, 5 Tex. Civ. App. 351, 23 S. W. 804, a statutory action of trespass to try title, tried by the court without a jury, where plaintiff was nonsuited at defendant's request, certain evidence on defendant's motion having been rejected on reversal, the court says:

“While it is ordinarily the rule to make a final disposition in this court of cases tried by the court below without a jury, in as much as the introduction of the administrator's deed would have presented an entirely different state of facts than that upon which the case was decided, and it being possible that the defendant had evidence of title in himself which he would have introduced had such a state of evidence confronted him, we think it proper to reverse and remand the cause for another trial, and it is so ordered.”

In *Fordyce v. Vickers*, 99 Ark. 500, 138 S. W. 1010, an action to quiet title, where both sides introduced evidence but the bill was dismissed on an issue of law, the court on reversing the trial court says:

“Ordinarily a chancery case which is appealed to this court will be tried here *de novo*, irrespective of how the chancellor reached his conclusion where the evidence has been fully developed. But where the chancellor has decided a cause upon an issue involving virtually a question of law, in which we find that he was in error, and leaves undecided other issues in the case involving questions of fact, which he is probably better able to pass upon by reason of his greater familiarity with the circumstances and conditions surrounding such issues, this court in its discretion may remand the case for his decision on said issue of fact.”

In *Gillespie v. Magruder*, 92 Miss. 511, 46 So. 77, 78, an action to establish a boundary line where the trial court failed to pass upon an issue made by appellants' answer that she had been in adverse possession of certain lands, the court says:

“Since it appears from the record that the chancellor did not consider this question when on trial before him, his attention being addressed to another feature of the complaint, and in order that the parties may be given full opportunity to take testimony on all the issues in this case, we think that the case should be reversed and re-

manded, with leave to either party to take further testimony and fully develop all contentions, and it is so ordered."

The rule is clear that a new trial should in all cases like the one at bar be granted where the case has not been fully developed, and where there are issues undisposed of either by the evidence or the findings of the Trial Court.

In this case, the defendant denies that he was a director of the Bank at any time subsequent to the 1st day of July, 1910, (p. 41 of the Record), after which date practically all the loans from which losses to the Bank resulted were made, and appellee Bowerman also alleges in his answer to the complaint that on or about the 1st day of July, 1910, (p. 54-5 of the Record), he resigned as Director of the Bank. There is no evidence in the case upon these allegations one way or another, neither does the evidence of plaintiff support the allegations of the bill that appellee Bowerman was a director at all times from the organization of the Bank to the date its doors were closed in June, 1911. The evidence of plaintiff, or appellant, shows that Bowerman was elected a director in January, 1910, and took his oath of office, and that is the last evidence presented by the appellant showing that Bowerman continued to act as a director, nor are there any findings of the Court in reference to these issues.

Justice, under the circumstances of the trial of this case, demands that this petitioner, at least, be

given an opportunity to be heard on these issues, because if they are determined in his favor, clearly, there can be no liability, and, because the appellant is now estopped by reason of his inaction in the Trial Court at the time the motion to dismiss was made to urge for the first time upon appeal that the appellee Bowerman is liable to the Bank for his inattention to his duty to exercise a reasonable supervision over the management of the Bank.

It is clear from the evidence that this appellee is not liable to the Bank on the theory on which the case was tried in the lower Court, because no evidence of any kind was introduced showing that he knowingly violated, or knowingly permitted to be violated any of the provisions of the National Banking Act. While there has crept into the evidence certain testimony which standing alone, tends to support the theory urged by the appellant, that appellee Bowerman should be held liable on account of his alleged negligence, yet, as we have shown, this theory was not urged in the Trial Court and in order that justice may be done the decree of the lower Court should be affirmed or at least a new trial granted.

WHEREFORE, your petitioner respectfully submits that a rehearing should be granted in this case for the reason that this Honorable Court erred in reversing the decree of the lower Court on a theory different from that on which the case was tried and decided in the lower Court, and for the further reason that if it should finally be held that the lower Court erred in dismissing the Bill as to appellee Bow-

erman, that this Honorable Court erred in directing the entry of final judgment against this petitioner and in not remanding the cause for a new trial, because the case was not fully developed, and because there are issues made by the pleadings that your petitioner was not a director of the Bank at the time the alleged loans were made and had resigned as such director before the alleged mismanagement took place, upon which issues no evidence was introduced and no findings made, and because the appellant had gained by his action an unconscionable advantage in trying his case on one theory and insisting that a decree against him in the Trial Court should be reversed on appeal on another and inconsistent theory.

Respectfully submitted,

RICHARDS & HAGA,

Solicitors for Petitioner, Guy E. Bowerman.

State of Idaho,
County of Ada,—ss.

I, James H. Richards, of Counsel for Petitioner above named, do hereby certify that in my judgment the foregoing Petition is well founded and that it is not interposed for delay.

JAMES H. RICHARDS,

*Solicitor and of Counsel for
Petitioner, Guy E. Bowerman.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Appellants,

vs.

W. R. GRACE & COMPANY, a Corporation,
Appellee.

Apostles.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

MAR 14 1916

F. D. Mockton,
Clerk.

No. 2750

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN H. A. ELVERS and FREDERICK A. E.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALITY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Praeceptum for Apostles on Appeal

To the Clerk of the Above-entitled Court:

SIR: The libelants herein having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein, you are hereby requested to prepare and certify the apostles on appeal to be filed in said Appellate Court in due course; said apostles on appeal to be prepared in accordance with Rule 4 of the Rules in Admiralty of said Appellate Court, except that "Exhibit 1" of libelants, introduced in evidence at the hearing before the above-entitled court, shall be filed in the Appellate Court in its original form; and said apostles on appeal to include in their proper order and form the following papers and documents, to wit, All the matters prescribed and mentioned in Admiralty Rule No. 4 of said Appellate Court.

Dated: October 26, 1915.

ANDROS & HENGSTLER,

Proctors for Libelants and Appellants.

[Endorsed]: Filed Oct. 27, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified apostles.

Statement of Clerk, U. S. District Court.**PARTIES.**

Libelants: Martin H. A. Elvers and Frederic A. E. Zimmer (Copartners, doing business as Knohr & Burchard, Nfl.).

Respondent: W. R. Grace & Co., a corporation.

PROCTORS.

For the Libelant: Golder W. Bell, Esq., and Messrs. Andros & Hengstler, San Francisco.

For the Respondent: Messrs. Goodfellow & Eells, San Francisco (Original Attorneys).

Messrs. Frank & Mansfield, San Francisco (Substituted Attorneys).

Nathan H. Frank, Esq. and Irving H. Frank, Esq., San Francisco (Attorneys now acting). [2]

PROCEEDINGS.

1909.

February 18. Filed verified Libel for Demurrage, in the sum of \$2,964.72.

Filed appearance of respondent, W. R. Grace & Co., waiving service of process, and reserving 20 days within which to plead.

March 10. Filed Exceptions to Libel.

October 16. The Exceptions to the Libel, filed herein, this day came on for hearing, in the above-entitled court, before the Honorable John J. De Haven, Judge, and after hearing argument, the Court ordered that

said Exceptions stand submitted, on points to be filed.

November 17. The Exceptions to the Libel, heretofore submitted, were, by the Court, this day, ordered overruled.

December 6. Filed Answer of W. R. Grace & Co., a corporation, to Libel herein.

7. Filed Respondent's Cross-Libel.

9. Filed Order staying proceedings, until libelants shall have given bond, to respond in damages as claimed in said Cross-Libel, under provisions of the 53d Admiralty Rule. [3]

December 23. Filed Motion to Strike out Cross-Libel.

Filed Motion to set aside Order staying proceedings herein, until libelants furnish security in accordance with the 53d Admiralty Rule.

1910.

January 4. The Motion to Strike Out Cross-Libel and Motion to Set Aside Order Staying Proceedings, etc., this day came on for hearing, before the Honorable John J. De Haven, Judge, and after hearing argument, the Court ordered that said motions stand submitted to the Court for decision.

- April 27. The order heretofore entered herein, on January 4th, 1910, submitting the Motions to Strike Out Cross-Libel and to Set Aside Order Staying Proceedings, etc., was this day set aside, and the cause ordered restored to the calendar for reargument.
- May 6. The Motion to Set Aside Order Staying Proceedings, etc., this day came on for rehearing, before the Honorable John J. De Haven, Judge, and after argument, the Court ordered that said motion be denied.
- September 29. Filed Stipulation (bond) under Admiralty Rule 53.
- November 18. Filed depositions of F. Unruh and Friedrich Flindt, taken on behalf of libelant, before American Consulate-General, at Hamburg, Germany. [4]
- 1912.
- April 24. Filed Libelant's Answer to Cross-Libel.
- 1914.
- February 26. Filed Notice of Motion for Order directing respondent to produce certain documents.
28. The Motion for Order directing respondent to produce certain documents this day came on for hear-

ing before the Honorable John J. De Haven, Judge, and after hearing respective parties, the Court ordered said motion denied.

March 24. Filed Deposition of A. J. Stewart, taken on behalf of respondent, before D. G. Marshall, Notary Public, at Vancouver, B. C.

June 6. Filed Deposition of W. C. W. Renny, taken on behalf of respondent, before N. W. Bolster, a Notary Public, at Seattle, Washington.

9. This cause this day came on for hearing in the District Court of the United States for the Northern District of California, First Division, at San Francisco, before the Honorable M. T. Dooling, Judge, and after hearing, etc., the Court ordered the cause submitted. The Court further ordered that libelants be permitted to file an Amended Libel herein.

11. Filed Amended Libel for Demurrage (\$3762.91).

July 1. Filed Exceptions to Amended Libel.
2. Filed Notice of Motion to Strike Exceptions to Amended Libel from files. [5]

July 11. The Court this day ordered that the Motion to Strike Exceptions to

Amended Libel from files, be denied. The oral motion of proctor for libelant, for order overruling said exceptions was likewise denied.

- | | | |
|----------|-----|---|
| August | 31. | Filed Answer to Amended Libel. |
| 1915. | | |
| May | 17. | Filed Opinion, in which it was ordered that the Exceptions to Amended Libel herein be sustained. |
| June | 3. | Filed Final Decree. |
| | 14. | Filed Decree Dismissing Respondent's Cross-Libel. |
| October | 13. | Filed Notice of Appeal. |
| | 22. | Filed Supersedeas Bond on Appeal, in the aggregate sum of \$450.00, with Massachusetts Bonding and Insurance Company as surety. |
| November | 1. | Filed one volume of testimony taken in open court. |
| 1916. | | |
| February | 23. | Filed Assignment of Errors. [6] |

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Libel for Demurrage.

To the Honorable JOHN J. DE HAVEN, Judge of
the United States District Court for the North-
ern District of California:

The LIBEL of Martin H. A. Elvers and Frederic
A. E. Zimmer against W. R. Grace & Co., for a cause
of contract, civil and maritime, alleges:

I.

That at all the times herein mentioned libelants
were and now are doing business in the City of Ham-
burg, Empire of Germany, as copartners under the
firm name and style of Knohr & Burchard, Nfl., and
were and now are the owners of the steel ship called
the "Schwarzenbek"; and that, at all of said times,
respondent was, and now is, as libelants are informed
and believe, a corporation organized and existing
under the laws of the State of Connecticut, and do-
ing business in the city of San Francisco, said North-
ern District of California.

II.

That on or about the 16th day of August, 1906, in

the City of London, England, the owners of said steel ship, Messrs. Knohr & Burchard, Nfl., libelants herein, by a written charter-party, chartered to respondent the said steel ship, in and by [7] which charter-party the whole of said ship was chartered unto said respondent for a voyage from a mill or loading place on Puget Sound, or in British Columbia not north of Burrard's Inlet, as might be directed by respondent, to Callao direct; and said respondent engaged by said charter-party to furnish the said vessel for said voyage a full cargo of sawn lumber and/or timber as therein specified. And it was further provided by said charter-party that orders as to loading mill should be given within 48 hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend or Royal Roads, failing which lay days to count. And it was further provided by said charter-party that said respondent should be allowed for the loading of said vessel lay days as follows: Thirty (30) working lay days for loading (not to commence before 1st Feby., 1907, unless with characters' consent), to commence twenty-four hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo, master having given written notice to that effect. And it was further agreed by said charter-party that for each and every day's deduction by the fault of respondent or agents said respondent should pay to libelants demurrage at the rate of three pence sterling per register ton per day. That a true copy

of said charter-party is hereunto annexed, marked Exhibit "A," and made a part hereof.

III.

That thereafter, to wit, on or about the 2d day of March, 1907, said ship arrived at Royal Roads and her master gave notice to respondent charterers of her arrival thereat, and thereupon respondent ordered "Millside" as the loading mill under said charter-party. That said ship was at said designated loading [8] place, with her inward cargo and/or unnecessary ballast completely discharged, and was ready to receive her cargo under said charter-party, and her master gave written notice of said facts and said readiness on the 13th day of March, 1907; and that the lay days for the loading of the cargo of said ship, pursuant to the terms of said charter-party, should have begun on the 14th day of March, 1907, and should have ended on the 19th day of April, 1907.

IV.

That notwithstanding said libelants had performed all the conditions of said contract of charter-party, and said ship was ready to receive her cargo, and respondent had 24 hours' notice thereof, pursuant to the terms of said charter-party, and said ship then and there remained at the direction and disposal of said respondent, and notwithstanding there was no remissness nor fault on the part of said libelants, yet the said respondent, by its own default, did not load the said ship within the thirty working lay days in said charter-party agreed upon, but, contrary to the terms of said charter-party, said respondent delayed said ship until the 15th day of May, 1907, thereafter.

V.

That libelants, by the acts and defaults of respondent as aforesaid, became entitled to demand from respondent demurrage for twenty-six (26) days at the rate of 3d per registered ton per day, amounting to the sum of Two Thousand Nine Hundred and Sixty-four 72/100 Dollars (\$2,964.72), over and above all just deductions.

VI.

That on or about the said 15th day of May, 1907, the master of said ship, on the demand of charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter-party as aforesaid by duly made protest, issued [9] bills of lading to said charterers, to wit, respondent, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which said bills of lading contained no reference to the demurrage previously incurred. That said bills of lading are in the possession or under the control of respondent, and out of the possession and control of these libelants, and that libelants pray for the production, by respondent, of the original bill of lading for greater certainty in the premises.

VII.

That notwithstanding respondent has been requested to pay the said sum of \$2,974.72, the demurrage aforesaid, respondent has refused and still refuses to pay the same or any part thereof.

VIII.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the

United States and to this Honorable Court.

WHEREFORE, libelants pray that a *or* citation, according to the practice of this Honorable Court in admiralty and maritime cases, may issue against the said respondent, and that it be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment of the demurrage aforesaid with costs, and that the libelants may have such other and further relief in the premises as in law and justice they are entitled to receive.

ANDROS & HENGSTLER,
Proctors for Libelants. [10]

Northern District of California,—ss.

Louis T. Hengstler, after being duly sworn, deposes: I am the proctor for libelants. Libelants in this cause are absent from this District, as deponent is informed and believes, to wit, in Hamburg, Germany. That the source of deponent's knowledge is documents and information derived from libelants, and that deponent verily believes the facts in this libel stated to be true.

LOUIS T. HENGSTLER.

Subscribed and sworn to before me this 18th day of February, 1909.

[Seal]

JOHN FOUGA,
Deputy Clerk U. S. District Court, Northern District
of California. [11]

[Exhibit "A" to Libel.]

"EXHIBIT A."

LUMBER.

1 THIS CHARTER PARTY, made and concluded upon in the City of London this 16th day of August one thousand nine hundred and Six BETWEEN MESSRS. KNOHR & BURCHARD NFL. for and on behalf of the owners of the Steel ship called the "SCHWARZENBEK," of the burden of 1877 tons or thereabouts, register measurement, now on passage to Santa Rosalia of the first part, and MESSRS. W. R. GRACE & CO. San Francisco of the second part,

10 WITNESSETH, that the said party of the first part, in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, does covenant and agree on the freighting and chartering of the whole of the said vessel unto the said party of the second part, for a voyage from a Mill or loading place on PUGET SOUND, or in British Columbia not north of Burrard's Inlet, as may be directed by Charterers, to

Callao direct

~~or to a direct port within said range, at Charters' option, orders to be given on signing Bills of Lading.~~ Charterers to have the privilege of loading vessel at two Mills, but same must be in the same country, they paying the extra cost of towage, if any, and time used in so moving to count as lay days.

20 The said vessel shall be kept tight, staunch, strong and every way fitted for such a voyage,

and receive on board for the aforesaid voyage, the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from said parties of the second part, or their agents.

23 The said party of the second part do engage to furnish the said vessel for the voyage aforesaid, a full cargo of SAWN LUMBER and/or TIMBER of such lengths and sizes as can be taken through vessel's hatchways ~~(and bow and stern ports, if any)~~. Lengths not shorter than sixteen feet, except at Charterer's option. No lumber to be cut by ship without written authority from the Charterers.

26 Vessel to have the privilege of loading a deck-load, not endangering safety of the cargo, paying the extra insurance on same. Cargo on deck to consist of the largest sizes of rough lumber unless otherwise directed by Charterers.

28 Broken stowage, if required, to be furnished by Charterers, ~~at their option~~, in lengths not shorter than twelve feet, paying half freight thereon, ~~failing which owners to have the privilege of loading same on ship's account.~~

30 Orders as to loading Mill to be given within forty-eight hours, Sundays and legal Holidays excepted, after notification to Charterers or their Agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend or Royal Roads, failing which lay days to count.

32 In case of fire or accident at the Mill where vessel is ordered to load, Charterers to have the privilege of ordering the vessel to another Mill

on Puget Sound or in British Columbia, pay the additional towage incurred, but lay days not to count during time occupied in moving.

34 The said party of the second part agrees to pay to said party of the first part, or Agents, for the charter or freight of said vessel during the voyage aforesaid, in the manner following, that is to say:

Fifty Shillings (50)

for each thousand feet, board measure, delivered.

~~If ordered to a direct port of discharge or if cargo be all discharged at port of call, the freight to be two shillings and six pence less per thousand feet.~~

43 Freight payable on the right and full delivery of cargo at final port of discharge, in good and approved Bills of Exchange on London at 90 days sight, or in cash at current rate of exchange, at Charterer's option.

45. ~~If discharge is required at more than one port sufficient cargo is to be left on board to enable the vessel to shift with safety, and vessel is not to be ordered to a port south.~~

52 Said party of the second part shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid, lay days as follows: Thirty (30) working lay days for loading, not to commence before 1st Feby 1907 unless with Charterer's consent, to commence twenty-four [12] hours after vessel is at loading place satisfactory to Charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo; Master having given written notice to that effect. Discharge to be given with dispatch according to the

custom of the port of discharge at such safe wharf, dock or place as Charterers may direct, but at not less than 35,000 feet B. M. per day. For each and every day's detention by the fault of party of the second part or agents, they agree to pay to the said party of the first part demurrage at the rate of three pence sterling per register ton per day. Should the vessel be detained by the Master beyond the time herein specified, demurrage shall be paid to Charterers at the same rate and in the same manner. Cargo shall be received and delivered within reach of vessel's tackles where she can lie afloat.

60 ~~Three days to be allowed Charterers' Agents for giving discharging orders at Port of Call.~~

61 Vessel to furnish, within five days after arrival at loading place, as ordered, a certificate from a Marine Surveyor of the San Francisco Board of Underwriters, that she is in proper condition for the voyage, and a further certificate in due course, that she is properly loaded. Should vessel fail to pass satisfactory survey and should she be detained more than ten days for repairs, to enable her to pass such survey, this charter to be void at Charterers' option, such option to be declared at the end of said ten days.

67 General Average, if any, as per York-Antwerp rules, 1890.

68 Cargo to be stowed under the Master's supervision and direction; Charterers' stevedore to be employed at ~~current rates~~ not exceeding \$1.10.

69 Bills of Lading to be signed for pieces with the clause—"All on board to be delivered," and

at any rate of freight shippers may desire without prejudice to this Charter; but if at a lower rate than provided in Charter, difference to be paid in cash at port of loading, less commission, interest and insurance.

72 (Act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collisions, strandings and other accidents of navigation, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the ship-owner, civil commotions, floods, frosts, storms, fire, strikes, lock-outs and stoppages (partial or otherwise) or accident at the mill, or on railways or docks; or strikes, lock-outs or stoppages (partial or otherwise) or any other hindrances or delays of whatsoever nature connected with the working, delivery or shipment of the cargo or any part thereof beyond the Charterers' or agents' control throughout the charter always excepted.)

78 Vessel to have a lien on cargo, for all freight, dead freight and demurrage, it being understood that all and any liability of the Charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the Consignees, the Owners and Captain looking to their lien on the cargo for this purpose.

81 Should the vessel be compelled to put into any part or ports, the Master shall consign her

to Charterers or their correspondents, paying them the usual commissions.

83 A sufficient amount for ship's ordinary disbursements at port of loading, say not exceeding ~~—~~ pounds sterling to be advanced by Charterers' on account of freight under this Charter Party, subject to a charge of ~~—~~ per cent, to cover interest, insurance and commission; advance to be endorsed on Captain's copy of Charter Party and all the Bills of Lading.

87 A commission of ~~five~~ $3\frac{3}{4}$ per cent, on estimated amount of this Charter is due and payable to Messrs. W. R. Grace & Co. San Francisco on completion of loading, ~~or should be lost.~~ Exchange at \$4.86 per £ sterling.

89 Vessel to be consigned to Charterers' agents at port of discharge inwards only, paying them a commission of two and one-half per cent, on amount of freight under this Charter and usual agency not exceeding five guineas for transacting vessel's inward business. At Charterers' option the above commission of ~~seven~~ six and ~~one half~~ quarter per cent is payable at port of lading. [13]

92 Vessel to be consigned outward to Charterers' agent on Puget Sound or in British Columbia, and inwards if in ballast, free of commission, paying them the usual fee for doing Custom House business, not to exceed twenty-five dollars. Vessel to clear at the Custom House in the name of Charterers.

94 In case the vessel does not arrive at Port of Call, or Mill as ordered by Charterers, on or be-

fore sundown of 31st March 1907 the Charterers are to have the option of cancelling or maintaining this Charter; said option to be declared within forty-eight hours after arrival of vessel at Port of Call or Mill as above.

97 To the true and faithful performance of all the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators and assigns, and also the said vessel, freight, tackle and appurtenances and the merchandise to be laden on board, each to the other, in the penal sum of amount of Charter.

IN WITNESS WHEREOF, we hereunto set our hands, the day and year first above written.

Signed in the Presence of Darsena Dues on cargo at Callao to be paid by Receivers there.

Signed in the presence of Messrs. W. R. GRACE & CO., San Francisco.

By Authority of Owners,
HOWARD HOULDER & PARTNERS, LTD.,
(S.) HOWARD HOULDER,
Director,
As Agents.

GRACE BROS. & CO., LTD.,
(S.) J. P. EYRE,

Managing Director As Agents, 16-8-06.

To the Clerk of the Court:

Please withhold citation.

ANDROS & HENGSTLER,
Proctors for Libelants.

[Endorsed]: Feb. 18, 1909. Jas. P. Brown, Clerk.
By John Fouga, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California.*

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO.,

Respondents.

(Substitution of Attorneys.)

We hereby consent to the substitution of Messrs.
Frank & Mansfield, as proctors for the respondents in the above-entitled cause, in our place and stead.

Dated, March 10th, 1909.

GOODFELLOW & EELLS.

[Endorsed]: Filed Mar. 10, 1909. Jas P. Brown,
Clerk. By John Fouga, Deputy Clerk. [15]

*In the District Court of the United States, in and for
the Northern District of California.*

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO.,

Respondents.

(Exception to Libel.)

To the Hon. JOHN J. DE HAVEN, Judge of the District Court of the United States, in and for the Northern District of California:

THE EXCEPTIONS of W. R. Grace & Co., to the Libel of Martin H. A. Elvers and Frederic A. E. Zimmer vs. W. R. Grace & Co., in a cause of contract, civil and maritime, alleges:

I.

That the charter-party provides that the bills of lading should be signed "without prejudice to this charter-party," and that said vessel should have "a lien on the cargo for demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions of demurrage or otherwise to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

That by reason of the foregoing the said libel does not state a cause of action against these respondents.

II.

That it is not alleged in said libel that the said alleged failure to load the said vessel within the time in said charter-party provided, was occasioned by the fault of the said respondents, or their agents.

[16]

WHEREFORE, these respondents pray that said libel may be dismissed, and for their costs herein.

FRANK and MANSFIELD,

Proctors for Respondents.

[Endorsed]: Exceptions overruled—Respondents to have ten days to answer.

Nov. 17, 1909.

JOHN J. DE HAVEN,
Judge.

Filed Mar. 10, 1909. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk. [17]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 17th day of November, in the year of our Lord, one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,980.

MARTIN H. A. ELVERS et al, .

vs.

W. R. GRACE & CO., etc.

(Order Overruling Exceptions to Libel.)

The exceptions to the libel herein having been heretofore submitted to the court for decision, now after due consideration had thereon, by the Court ordered that said exceptions be, and the same are hereby overruled. Further ordered that respondent herein be, and it is hereby allowed ten days in which to answer said libel. [18]

[Answer.]

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY.

MARTIN A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

To the Hon. JOHN J. DE HAVEN, Judge of the
District Court of the United States, in and for
the Northern District of California.

THE ANSWER of W. R. Grace & Co., a corporation, respondent, to the libel of Martin A. Elvers and Frederic A. E. Zimmer vs. W. R. Grace & Co. and to all persons lawfully intervening for their interests herein, in a cause of contract, civil and maritime, alleges:

Answering unto the first article in said libel, and particularly unto the allegation therein that the said libelants were and are doing business in the city of Hamburg, in the Empire of Germany, as copartners under the firm name of Knohr & Burchard, Mfl., and were, and now are, the owners of the steamship called the "Schwarzenbek," this respondent is ignorant, so that it can neither admit nor deny the same, wherefore on that ground, it calls for proof thereof.

II.

Answering unto the third article in said libel, this respondent denies that the said steamship was at the said designated loading place in said libel mentioned, or at any designated loading place with her inward cargo and unnecessary ballast completely discharged, or that said vessel was ready to receive her cargo under the said charter-party on the 13th day of March, 1907, or at any time or at all before the 22d day of March, 1907. [19]

Further answering this respondent denies that said master gave written notice of his readiness to receive cargo under said charter-party on the 13th day of March, 1907, but admits that he did give said notice on the 21st day of March, 1907; and said respondent further alleges that at the time of giving said notice said vessel was not rigged for taking in lumber and was not prepared to take in lumber until the 22d day of March, 1907.

Respondent further denies that lay days for the loading of the cargo of said ship pursuant to the terms of the charter-party should have begun on the 14th day of March, 1907, or should have ended on the 19th day of April, 1907; on the contrary, said respondent alleges that the lay days for loading said cargo pursuant to the terms of said charter-party should and did begin on the 23d day of March, 1907, and should and did end on the 17th day of May, 1907.

III.

Answering unto the fourth article in said libel, this respondent denies that said libelants had performed all of the conditions in said contract of charter-

party, and further denies that said ship was ready to receive her cargo or that the respondent had 24 hours' notice thereof pursuant to the terms of said charter party, except as last hereinbefore alleged. Said respondent further denies that said ship then and there remained at the direction or disposal of said respondent, but alleges that on the 1st day of April, 1907, the master of said vessel of his own motion, and without cause, did stop, cease and discontinue the further loading of said vessel, and refused to accept any delivery of cargo, and continued so to refuse up to and until the afternoon of the 3d of April, 1907, whereby three days were lost to said respondent in the loading of said vessel. Said respondent further alleges that on March 29th and April 1st were respectively [20] holidays at said loading port, and were not working lay days for loading.

Respondent further alleges that on the 23d day of April, 1907, the stevedores' crew engaged in the loading of said ship combined in a strike and ceased work, and did coerce and intimidate other workmen from assisting in the loading of said vessel, and that said strike continued until the 11th day of May, 1907, on which day said stevedore crew again commenced to work and completed the loading of said vessel on the 15th day of May, 1907. That under the terms of said charter-party the said lay days would have expired on the 17th day of May, 1907, and not otherwise.

Further answering unto said article, this respondent denies that there was no remissness or fault on

the part of the libelants, and they further deny that said respondent by its own default did not load the ship within 30 working lay days in said charter-party agreed upon, or that contrary to the terms of said charter-party, or otherwise, or at all, said respondent delayed the said ship until said 15th day of May, 1907, or otherwise or at all delayed said ship.

IV.

Answering unto the fifth article in said libel, this respondent denies that by the acts or defaults of respondent, or otherwise, or at all, the said libelants became entitled to demand from said respondent demurrage for 26 days, or for any other time whatsoever, at the rate of 3 pence sterling per registered ton per day, or at any rate whatsoever, amounting to the sum of Two Thousand Nine Hundred and Sixty-four and $73/100$ (2,964.73) Dollars over and above all just deductions, or amounting to any sum of money whatsoever, or at all.

V.

Further answering unto said libel, and particularly unto [21] the eighth article thereof, this respondent denies that all or singular the premises are true, but admits that the same are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, said respondent prays that said libel be dismissed and for its costs herein.

W. R. GRACE & CO.,

GALE H. CARTER,

Sub-Manager.

FRANK & MANSFIELD,

Proctors for Respondent.

United States of America,
Northern District of California,—ss.

Gale H. Carter, being duly sworn, deposes and says: That he is an officer of W. R. Grace & Co., a corporation, respondent in the above-entitled cause, to wit, the sub-manager thereof; that he has read the foregoing Answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

GALE H. CARTER.

Subscribed and sworn to before me this 6th day of December, 1909.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Dec. 6, 1909. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [22]

[Cross-libel.]

*In the Distrit Court of the United States, in and for
the Northern District of California.*

MARTIN A. ELVERS and FREDERIC A. E. ZIM-
MER,

Libelants,

vs

W. R. GRACE & CO., a Corporation,
Respondent.

To the Hon. JOHN J. DE HAVEN, Judge of the District Court of the United States, in and for the Northern District of California:

The Cross-libel of W. R. Grace & Co., a corporation, to the libel of Martin A. Elvers and Frederic A. E. Zimmer, and to all persons lawfully intervening for their interests therein, in a cause of contract, civil and maritime, alleges:

I.

That at all of the times hereinafter mentioned the said W. R. Grace & Co. was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of Connecticut, and doing business in the City and County of San Francisco, in the Northern District of California.

II.

That on the 16th day of August, 1906, the said cross-libelant entered into a contract of charter-party with Messrs. Knohr & Burchard, Mfl., wherein and whereby the said cross-libelant chartered the ship "Swarzenbek," a vessel of 1877 tons, or thereabouts, registered measurement, for a voyage from a mill or loading place on Puget Sound or in British Columbia not North of Bird's Inlet as may be directed by charterer, to Callao, direct. That it [23] was among other things in and by said charter-party provided that the said charterer should be allowed for loading, 30 working lay days, to commence 24 hours after the vessel is at loading place satisfactory to charterers, inward cargo and unnecessary ballast discharged, and ready to receive cargo, master having given written notice to that effect. That for each and

every day's detention by the fault of said charterers, they agree to pay to the said owners demurrage at the rate of 3 pence sterling per registered ton per day. Should the vessel be detained by the master beyond the time in said charter-party specified, demurrage shall be paid to charterers at the same rate and in the same manner, cargo to be received and delivered within reach of ship's tackle, where she can lie afloat.

III.

That thereafter, to wit, on the 23d day of March, 1907, the said vessel was alongside the wharf, as directed by said charterers, and ready to begin the loading of said cargo in accordance with the terms of said charter-party.

IV.

That thereafter, notwithstanding that the said cross-libellant has performed all the terms and conditions in said charter-party on its part to be performed, nevertheless the master of said vessel detained the same in the lading thereof, beyond the time in said charter-party provided, by refusing to accept and receive cargo delivered by said cross-libellant within reach of vessel's tackle, for the period of three days.

V.

That said cross-libellant, by reason of said acts and default on the part of the master of said vessel, as aforesaid, became entitled to demand from said owners, demurrage for said 3 days at the rate of 3 pence sterling per registered ton per day, amounting in all to Three Hundred and Six and 86/100 (306.86) [24] Dollars, over and above all just deductions.

That no part thereof has been paid, but the entire amount, together with the interest, remains due and owing from said owners to this cross-libelant.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, said cross-libelant prays that said libelants may be cited to appear and answer to said cross-libel and give security in the usual amount and form to respond in damages as claimed in said cross-libel, and that all proceedings upon the original libel be stayed until such security shall be given; and that they be further required to answer on oath this cross-libel and the matters therein contained, and that this Honorable Court will be pleased to decree to the cross-libelant the payment of the amount which shall be due to it, with interest and costs, and that it have such other and further relief as in law and justice it may be entitled to receive.

W. R. GRACE & CO.,
By GALE H. CARTER,
Sub-Manager.

NATHAN H. FRANK,
Proctor for Cross-libelant.
FRANK & MANSFIELD,
Counsel. [25]

State of California,
City and County of San Francisco,—ss.

Gale H. Carter, being duly sworn, deposes and says: That he is an officer of W. R. Grace & Co., a Corporation, Cross-libelant in the above-entitled cause, to wit,

the sub-manager thereof; that he has read the foregoing Cross-libel, and knows the contents thereof, and that the same is true as he verily believes.

GALE H. CARTER,

Subscribed and sworn to before me this 7th day of December, 1909.

[Seal]

CHARLES EDELMAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9, 1910.

Receipt of a copy of the within Cross-libel is hereby acknowledged this 7th day of December, 1909, reserving all rights.

ANDROS & HENGSTLER,

Proctor for Libelants.

[Endorsed]: Filed Dec. 7, 1909. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [26]

In the District Court of the United States, in and for the Northern District of California.

IN ADMIRALTY—No. 13,980.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom in the Post-office Building in the City and County of San Francisco, on Thursday, the 9th day of December, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, District Judge.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

(Order Staying Proceedings.)

It appearing that the respondent in the above-entitled cause has filed a Cross-libel therein;

NOW, THEREFORE, IT IS HEREBY ORDERED that all proceedings in the above-entitled cause be, and the same hereby are, stayed until the above-named libelants shall have given security in the usual amount and form to respond in damages as claimed in said Cross-libel in accordance with the provisions of the 53d Admiralty Rule.

December 9, 1909.

JOHN J. DE HAVEN,

Judge.

[Endorsed:] Filed Dec. 9, 1909. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [27]

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY—No. 13,980.

MARTIN A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Motion to Strike Out "Cross-Libel."

Please take notice that on Tuesday, the 28th day of December, A. D. 1909, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, libelants in the above-entitled cause will move the Court, at the courtroom thereof, to strike from the records and files of said action the alleged "Cross-libel" filed herein by respondent on the 7th day of December, A. D. 1909, on the grounds:

First. That said alleged "Cross-libel" was not filed within the time allowed by law or the rules of the Court;

Second. That no process has been issued nor served upon libelants in this action.

And at the same time and place, and on the same grounds, libelants will move the Court to set aside all orders made and based upon said alleged "Cross-libel," and in particular the ex parte order made on the 9th day of December, A. D. 1909, ordering that all proceedings in the above-entitled cause be stayed until libelants shall have given security in accordance with the provisions of the 53d Admiralty Rule.

This motion will be made on the records and files of this action.

ANDROS & HENGSTLER,

Proctors for Libelants.

To the Respondent herein and

Messrs. FRANK & MANSFIELD,

Its Proctors.

Receipt of a copy of the within is hereby admitted this 23d day of December, 1909.

FRANK & MANSFIELD.

[Endorsed]: Filed Dec. 23, 1909. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [28]

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY—No. 13,980.

MARTIN A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

W. R. GRACE & CO., a Corporation,

Respondent.

Motion to Set Aside Order (Staying Proceedings).

Please take notice that, in the event that the motion (of which previous notice has been given) to strike the "Cross-libel" filed herein from the files of the above-entitled cause, be denied, libelants in the above-entitled cause will, on Tuesday, the 28th day of December, A. D. 1909, immediately after said last-mentioned motion has been heard, or as soon thereafter as counsel may be heard, at the courtroom of said court, move the Court to set aside the order of the Court made on the 9th day of December, A. D. 1909, ordering that all proceedings in the above-entitled cause be stayed until the above-named libelants shall have given security in the usual amount and form to respond in damages as claimed in said alleged "Cross-libel" in accordance with the provisions of the 53d Admiralty Rule.

Said motion will be made on the ground that, assuming that a Cross-libel is properly before the Court in this action, the said Cross-libel does not state a

counterclaim arising out of the same cause of action for which the original libel was filed or any counterclaim whatever; and on the further ground that it appears from the records and files herein that the demurrage claimed in said Cross-libel is not the proper amount of demurrage, assuming that any demurrage is due to respondent; and on the further ground that said alleged Cross-libel does not [29] state facts sufficient and is too uncertain and indistinct to constitute a cause of Cross-libel; and on the further ground that the facts appearing in the record show that the 53d rule in Admiralty does not apply to the said Cross-libel or the present action.

This motion will be made on the records and files of this action.

ANDROS & HENGSTLER,
Proctors for Libelants.

To the Respondent herein and
Messrs. FRANK & MANSFIELD,
Its Proctors.

Receipt of a copy of the within is hereby admitted this 23d day of December, 1909.

FRANK & MANSFIELD.

[Endorsed]: Filed Dec. 23, 1909. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [30]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 4th day of January, in the year of our Lord, one thousand nine hundred and ten. Present: The Honorable JOHN J. DE HAVEN, Judge.

#13,980.

MARTIN H. A. ELVERS et al.,

vs.

W. R. GRACE & CO., etc.

**(Order Submitting Motion to Strike Out Cross-Libel,
etc.)**

The motions herein to strike out the Cross-libel now on file and for an order setting aside and vacating the order heretofore made on December 9, 1909, staying all proceedings in accordance with the provisions of the 53d Admiralty Rule, this day came on for hearing, Louis T. Hengstler, Esqr., appearing for and Nathan H. Frank, Esqr., against said motions, and after hearing proctors, by the Court ordered that said motions be, and they are hereby submitted to the Court for decision. [31]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 27th day of April, in the year of our Lord, one thousand nine hundred and ten. Present: The Honorable JOHN J. DE HAVEN, Judge.

#13,980.

MARTIN H. ELVERS et al.

vs.

W. R. GRACE & CO., etc.

(Order Setting Aside Order Submitting Motion to Strike Out Cross-Libel, etc.)

In each of the above-entitled cases by the Court ordered that the orders heretofore made therein submitting said cases to the Court for decision be, and the same are hereby set aside and vacated. Further ordered that each of said cases be, and the same is hereby restored to the calendar for re-argument.

[32]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 6th day of May, in the year of our Lord, one thousand, nine hundred and ten. Present: The Honorable GEORGE DENWORTH, Judge.

#13,980.

MARTIN H. A. ELVERS et al.

vs.

W. R. GRACE & CO., etc.

(Order Denying Motion to Set Aside Order Staying Proceedings, etc.)

The motion for an order setting aside the order staying proceedings herein on Dec. 9, 1909, ordering that all proceedings be stayed until the libelants shall have given security in accordance with the provisions of the 53d Admiralty Rule, this day came on for hearing, Louis T. Hengstler, appearing as proctor for libelants, and Nathan H. Frank, as proctor for respondent, and after hearing argument, by the Court ordered that said motion be, and the same is hereby DENIED. [33]

[Answer to Cross-Libel.]

*In the District Court of the United States, in and for
the Northern District of California.*

No 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO, a Corporation,

Respondent.

THE ANSWER TO THE CROSS-LIBEL of respondent, in an alleged cause of contract, civil and maritime, alleged:

I.

Admits the allegations in Article I of said cross-libel.

II.

Admits the allegations in Article II of said cross-libel.

III.

Admits that, on the 23d day of March, 1907, the said vessel was alongside the wharf, as directed by said charterers, and on this behalf alleges that she was alongside said wharf, as directed by said charterers, at all times from and after six o'clock P. M. of the 12th day of March, 1907; denies that she was ready to begin the loading of said cargo in accordance with the terms of said charter-party on said 23d day of March, 1907, and on this behalf alleges that she was ready to begin the loading of said cargo, in accordance with the terms of said charter-party, at six o'clock P. M. of the 12th day of March, 1907.

IV.

Denies that said cross-libelant has performed all the terms or conditions in said charter-party on its part to be performed; denies that the master of said vessel detained the same in the lading thereof beyond the time in said charter-party provided or for the period of three days or for any other period of time. [34] Denies that said master refused at any time to accept or receive cargo delivered by cross-libelant in accordance with the terms of said charter-party.

V.

Denies that said cross-libelant, by reason of the

alleged or any acts or default on the part of the master of said vessel, became entitled to demand from said owners demurrage for any period of time or at any rate or in any amount whatever. Denies that the amount in said article alleged, or any interest, remains or is due or owing from said owners to this cross-libelant.

VI.

Denies that all or singular the premises in Article VI of the cross-libel referred to are true, except as herein admitted.

WHEREFORE Libelants herein pray that said cross-libel be dismissed, and for their costs herein.

ANDROS & HENGSTLER,

Proctors for Libelant.

Verification of the foregoing answer to cross-libel is hereby waived.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelant.

[Endorsed]: Filed Apr. 24, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [35]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY.—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO, a Corporation,

Respondent.

**(Notice of Motion for Order Directing Respondents
to Produce Certain Documents.)**

To W. R. Grace & Co., Respondent herein, and Messrs.

Nathan H. Frank and Irving H. Frank, Its
Proctors:

Please take notice that on Saturday, the 28th day of February, 1914, at ten o'clock A. M., or as soon thereafter as counsel may be heard, libelants will move the above-entitled court for an order directing respondent, its agents and representatives, to produce any and all documents in respondent's possession or control relating to any question in issue in this case, and in particular the correspondence and all wires exchanged between respondent and the loading mill at which the German ship "Schwarzenbek" was loaded in March, April and May, 1907, under the charter-party involved in the above-entitled cause, also all the correspondence and wires exchanged between respondent and Captain Frederick Flindt of said German ship, also all the correspondence and

wires exchanged between said loading mill and said Captain Flindt, also all the correspondence and wires between the respondent and the stevedores who loaded said ship. Said application will be made to produce said documents, for the inspection of proctors for libelants, at a time and place convenient to respondent and said proctors, and not later than Friday, the 6th day of March, 1914, so as to enable libelants to prepare for the hearing of said cause, now set for March 9, 1914.

ANDROS & HENGSTLER,

Proctors for Libelants.

Dated San Francisco, Cal., February 24, 1914.

Receipt of a copy of the within notice of motion is hereby admitted this 24th day of February, 1914.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Respondent.

[Endorsed]: Filed Feb. 26, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [36]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 4th day of January, in the year of our Lord, one thousand, nine hundred and ten. Present: The Honorable M. T. DOOLING, Judge.

No 13,980.

ELVERS et al.

vs.

W. R. GRACE & CO.

(Order Denying Motion to Produce Certain Documents.)

The motion for an order to produce documents herein this day came on for hearing, and after hearing respective proctors, by the Court ordered that said motion be, and the same is hereby denied. [37]

(Testimony Taken in Open Court.)

In the District Court of the United States for the Northern District of California, First Division.

No 13,980.

Honorable MAURICE T. DOOLING, Judge.
MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO, a Corporation.

Respondent.

[Proceedings Had Tuesday, June 9th, 1914.]

Tuesday, June 9th, 1914.

COUNSEL APPEARING:

For the Libelants: L. T. HENGSTLER, Esq.,
and GOLDEN BELL, Esq.

For the Respondent: NATHAN H. FRANK,
Esq., and IRVING H. FRANK, Esq.

Mr. BELL.—I wish to introduce in evidence, first,

as an exhibit, a map showing the location of Royal Roads, and the approximate location of Millside. It will be for the convenience of the Court, so that the Court will be familiar with the territory involved. I will show it to you, Mr. Frank.

Mr. FRANK.—That is all right. Of course, we object to it as immaterial and irrelevant. It is an ordinary chart.

(The map was here marked “Libelants’ Exhibit 1.”)

Mr. BELL.—I also wish to introduce the original charter-party in this action. I will let you inspect this, Mr. Frank.

Mr. FRANK.—If you say that is the document, that is all right.

Mr. BELL.—I ask that that be marked “Libelants’ Exhibit 2.” (The document was here marked Libelants’ Exhibit 2.”)

I wish to introduce in evidence the deposition of Friedrich Flindt, the Master of the “Schwarzenbek.” That deposition consists [38] of only a couple of pages. I think it would be better to read it so that your Honor may have the issues clearly before you as we proceed. (Reads.)

I also offer the deposition of Fritz Karl Rudolph Unruh. I offer these depositions in evidence on behalf of the libelants and ask that they be marked “Libelants’ Exhibit 3.”

(The documents were marked “Libelants’ Exhibit 3.”)

Now, with reference to the correspondence, notices,

and so forth, which took place between the shippers, the charterers and their agents, we have made demand upon Mr. Frank for various documents specifically and also a general demand. If there is no objection to these documents, Mr. Frank, suppose we stipulate what the facts are.

Mr. FRANK.—I know of no documents myself except those which you had in your possession for two years or more and that I got from you yesterday; outside of those I know of no documents. You gave me your notice to produce and I passed it on to the respondent and that is all they found, the documents that were in your possession.

Mr. BELL.—Those were given to us upon the recommendation of their former counsel, the counsel who represented them before you were substituted, Mr. Frank; as to those documents, Mr. Frank, is there any dispute, as to those that I specifically mentioned?

Mr. FRANK.—How do you mean?

Mr. BELL.—I mean as to the authenticity of these telegrams, for instance.

Mr. FRANK.—I know nothing about them. You will have to treat them for what they are worth. I know nothing about them.

Mr. BELL.—Not even the telegrams?

Mr. FRANK.—I know nothing about the telegrams.

Mr. BELL.—Or the copies of the telegrams? [39]

Mr. FRANK.—I know nothing about them.

Mr. BELL.—Then I will have to call Mr. Hengstler as a witness on that matter, unless we can agree on it.

Mr. FRANK.—You can make your proof in the regular way.

Mr. HENGSTLER.—You had that correspondence for years, Mr. Frank, and you know about them as well as I do.

Mr. FRANK.—Well, I say that I never saw that correspondence until yesterday and I didn't know where to look for it until I got them from you yesterday; let us not have any personalities about this matter.

[Testimony of L. T. Hengstler, for Libelants.]

Mr. L. T. HENGSTLER, called for the libelants, sworn.

Mr. BELL.—I will show you these documents, Mr. Frank.

Mr. FRANK.—Your Honor will pardon me for taking so much time in looking over these documents; I have never seen this part of them at all.

Mr. BELL.—Q. Mr. Hengstler, I hand you a letter with certain documents attached and ask you what that letter is and what those documents are and how they came into your possession.

Mr. FRANK.—What the letter is and what those documents are speak for themselves; of course, the letter is a typewritten letter, it bears no signature—that is, I mean it bears no written signature; it is a typewritten signature. How they came into his possession would be perfectly competent, but otherwise I object to the question.

Mr. BELL.—I withdraw that question.

Q. Mr. Hengstler, how did these documents come into your possession?

(Testimony of L. T. Hengstler.)

A. When this matter was first placed in my hands by the German Consulate-General on behalf of the firm of Knohr & Burchard of Hamburg, Germany, I communicated with Messrs. W. R. Grace & Company and [40] they referred me to their counsel, Messrs. Goodfellow and Eells of this city. I called at the office of those gentlemen and was told that Mr. Eells had charge of the matter for W. R. Grace & Company, and I talked the facts over with Mr. Eells and Mr. Eells told me that he would instruct W. R. Grace & Company to tell me what correspondence and what telegrams were exchanged between the Captain and W. R. Grace & Company, and asked me to call at the office of W. R. Grace & Company, and I called there and they gave me these copies of telegrams which were exchanged between the Captain of the German ship "Schwarzenbek" and their office and their stevedores and told me that that was the correspondence that passed between them as far as they then had it. Later I got another list of telegrams, and the new list contained some which they afterwards must have obtained because it contained some additional telegrams; they at that time freely told me all the facts and showed me the correspondence and all the documentary evidence in their possession.

Mr. FRANK.—I think that is immaterial, your Honor. The question is how these came into his possession.

Mr. BELL.—Q. Are these the documents that came

(Testimony of L. T. Hengstler.)

into your possession in the way that you have explained?

A. Yes, with the exception that I made a memorandum on the first document, the letter signed W. R. Grace & Company; true it is signed in typewriting, but I received it from them together with these documents; I made a memorandum on it in pencil. That memorandum was made by myself; it did not come from the other side; it is in reference to a bond.

Q. Refreshing your recollection from those documents, Mr. Hengstler, will you say what correspondence was exchanged between W. R. Grace & Company, the Captain of the ship "Schwarzenbek" and the agents of W. R. Grace & Company, as admitted to you by them? [41]

Mr. FRANK.—I do not see how the witness can refresh his recollection from documents not made by himself.

Mr. BELL.—They were made by your client.

Mr. FRANK.—Very well, but he cannot refresh his recollection from them; they speak for themselves for whatever they are worth.

Mr. BELL.—Very well; I will offer them in evidence.

The WITNESS.—I think, Mr. Bell, you will notice that those are duplicated.

Mr. FRANK.—I noticed they were duplicated, yes. Will you let me take that duplicate, Mr. Bell?

Mr. BELL.—I offer the documents which have been identified by Mr. Hengstler in evidence as showing the correspondence which took place between the

(Testimony of L. T. Hengstler.)

Captain of the ship "Shewarzenbek" and the charterers and their agents with respect to the arrival and the unloading of that ship, involved in the issues in this case.

Mr. FRANK.—Q. Mr. Hengstler, were all of these documents passed to you at the same time, on the date of that letter, August, 1908?

A. The first four pages were passed to me at the same time. I have stated before that I received an additional list of documents later, and the additional list is the last three pages, I think it is exactly the same except that there are perhaps one or two new telegrams added to the other one; it is practically a duplicate with the addition of some other ones.

Q. Then the last three pages are not papers that were referred to in the letter of August 20, 1908?

A. No, they are not, but they are papers that were handed to me as being the correspondence that passed.

Q. Who was the particular person who handed them to you?

A. They were handed to me in the office of W. R. Grace & Company by a clerk; I do not know his name.
[42]

Q. Some clerk in the outside office?

A. I don't know what you call the outside office.

Q. Well, you know that the managers have an inside office and that the clerks are out in the general office; you had no conference with any manager, did you?

A. Yes, I had a conference with Mr. Rossiter who is the chief manager. I think those documents were

(Testimony of L. T. Hengstler.)

handed to me on the order of Mr. Rossiter by a clerk.

Q. You say you think; of course, you don't know anything about that, Mr. Hengstler. You never heard Mr. Rossiter give any instructions, did you?

A. I have answered the question, I said I think so.

Q. When you say you think so you don't mean to affirm it, that is only your belief, and that is all, because you were not present and you never heard any order from Mr. Rossiter to deliver these documents, did you?

A. I would not be certain, but I think I was present when Mr. Rossiter told the clerk to give me copies of everything in the office. Mr. Rossiter from the beginning was willing to give me all the facts, on the instructions of his counsel, Mr. Eells.

Mr. FRANK.—That is all.

Mr. BELL.—I offer these documents which are attached together in evidence and ask that they be marked "Libelants' Exhibit 4." I wish to read this correspondence to the Court. The letter referred to reads as follows. It is dated August 20, 1908. (Reads.)

Then the first page attached to this letter, on the letterhead of W. R. Grace & Company, San Francisco, and marked "Copy" reads as follows. (Reads.)

It will be noted that on April 23d a strike commenced and on May 11th the strike was settled and loading resumed. The total [43] of lay days as computed by W. R. Grace & Company amounts to 261½. What I have read constitutes the first three

(Testimony of L. T. Hengstler.)

pages attached to the letter. The next three pages attached to the letter read as follows. These are the ones which did not come with the letter but are documents which were handed Mr. Hengstler, as he testified, by W. R. Grace & Company. They have noted when they received a telegram from him and when they sent a telegram to him. (Reading.)

(The document was here marked "Libelants' Exhibit No. 4.")

Now, how about these letters, Mr. Frank (indicating)?

Mr. FRANK.—Mr. Bell, I am in the same position as to those as I was as to the others. The first I saw of them was when they came from your possession yesterday.

Mr. HENGSTLER.—Oh, Mr. Frank, we gave you notice 30 days ago to produce these letters.

Mr. FRANK.—I think your Honor understands my position about these letters. I did receive a notice to produce these letters and immediately upon receiving it I passed it along to my clients; they finally discovered that they were in the possession of Dr. Hengstler and I only got them Monday. I simply make that statement in response to what Mr. Hengstler has said.

Mr. HENGSTLER.—Did you ask them for any correspondence with the mill company that loaded this vessel?

Mr. FRANK.—I made a copy of your demand and passed it into them in that shape.

(Testimony of L. T. Hengstler.)

Mr. HENGSTLER.—And you got no correspondence from the mill company?

Mr. FRANK.—Is there anything in your demand about correspondence with the mill company?

Mr. BELL.—Yes, it says any and all correspondence, whether by telegram or by post or through any other medium, between any and all of the following, naming all the parties. [44]

Mr. FRANK.—I will look through my files; if I have any mill company correspondence you can have it.

Mr. HENGSTLER.—You never have looked through your files before?

Mr. FRANK.—Not as to the mill company. I did not understand you asked for that.

Mr. BELL.—Q. Mr. Hengstler, do you recognize the documents which you hold in your hands?

A. I do.

Q. Where have you seen those documents before, and under what circumstances?

A. They were handed to me by someone in the office of W. R. Grace & Company as copies of part of the correspondence referring to this demurrage case. I was then informed that H. C. Hylton, the writer of these letters, was the agent of W. R. Grace & Company at the loading port for the purpose of superintending the loading; that is what I understood at the time.

Mr. FRANK.—Q. Was it not that he was simply a lumber inspector?

A. Yes, he was the lumber inspector who acted

for W. R. Grace & Company.

Mr. BELL.—I offer these documents in evidence and ask that they be marked “Libelants’ Exhibit 5.”

Mr. FRANK.—We will have to object to those upon the ground that we are not bound by any admission of Mr. Hylton.

Mr. BELL.—I think it appears in W. R. Grace & Company’s own memorandum that he was agent for W. R. Grace & Company.

Mr. FRANK.—He was a lumber inspector, as I understand it.

Mr. BELL.—He says, “agent.”

The COURT.—The objection is overruled.

Mr. FRANK.—We note an exception.

Mr. BELL.—I offer in evidence of these letters those which are dated as follows: The letter of March 23, 1907, from H. D. Hylton to Messrs. Bartlett & Company. [45]

The letter of March 31, 1907, from H. D. Hylton to Messrs. Grace & Company.

The letter of April 11, 1907, from H. D. Hylton to Messrs. W. R. Grace & Company.

The letter of April 13, 1907, from Hylton to Grace & Company.

The letter of April 15, 1907, from Hylton to Grace & Company.

The letter of April 20, 1907, from Hylton to Grace & Company.

The letter of April 24, from Hylton to Messrs. Bartlett & Company.

Mr. FRANK.—Do I understand you are not offer-

ing the entire correspondence?

Mr. BELL.—I am not offering some of the later letters.

Mr. FRANK.—In order to save time I would suggest that you put them all in.

Mr. BELL.—If you wish the others to go in, Mr. Frank, you can offer them.

Mr. FRANK.—If part of them goes in they should all go in.

Mr. BELL.—I only wish the correspondence which has to do with the loading up there. What occurred after that time I do not care to offer. If you wish to offer the others you can do so. I am offering only the letters which I am specifying.

(The documents were here marked “Libelants’ Exhibit No. 5.”)

Mr. FRANK.—What is it you have just handed me, Mr. Bell?

Mr. BELL.—Those are the ones I have not offered in evidence.

Mr. FRANK.—Do you offer the letter of April 27th?

Mr. BELL.—No, I have not offered that.

Mr. FRANK.—And I would like to have that letter also.

Mr. BELL.—Here it is. (Handing.)

I will show you this letter, Mr. Frank. I wish to offer in evidence a copy of a letter to Captain W. C. W. Renny of Vancouver, from F. Flindt, the Master of the “Schwarzenbek,” dated March 19, 1907. [46]

Mr. FRANK.—This does not purport to be an

original, your Honor; it purports to be a copy. There is no signature to it. It is typewritten. It has no connection with us at all. I understand Mr. Hengstler will testify he received this from Grace & Company.

Mr. HENGSTLER.—Yes. There is a connection between this letter and W. R. Grace & Company because it is addressed to their stevedore.

Mr. FRANK.—It purports to be a copy of a letter made by these libelants and it purports to have been sent to Grace & Company.

Mr. HENGSTLER.—No, to their stevedore, W. C. W. Renny. I received it from Grace & Company as being one of the communications between the Captain and their stevedore.

Mr. FRANK.—That could hardly be. You received it from W. R. Grace & Company as being a paper that was received by them from your clients. Your Honor can see the paper for yourself and you can see what the objection is to it.

Mr. BELL.—Well, Mr. Frank, we demand the original of that letter. We are simply endeavoring to save time.

Mr. FRANK.—If I have the original you can have it.

Mr. BELL.—Your clients have it or they should have it.

Mr. FRANK.—You are assuming something which you have no right to assume.

The COURT.—I understand that this was furnished you with the other documents?

Mr. BELL.—Yes, your Honor, by W. R. Grace & Company.

The COURT.—The objection is overruled.

Mr. FRANK.—If your Honor will permit me just a moment: as your Honor will see, that purports to be a copy of a letter sent by the libelants to my clients who in turn passed it along to Mr. Hengstler. That is all there is to it. There is nothing to prove its authenticity. It would be purely a self-serving document that they passed [47] through us.

Mr. HENGSTLER.—Except the admission of your own client proves its authenticity.

The COURT.—This is a copy made by your client?

Mr. FRANK.—No, sir. You will see it says on the bottom, "True copy, Knohr & Burchard."

Mr. BELL.—And I think that means that they sent a true copy to Knohr & Burchard.

The COURT.—That is on your letter-head. I will admit it.

Mr. FRANK.—We note an exception.

Mr. BELL.—That will be offered in evidence as "Libelants' Exhibit 6."

(The document was here marked "Libelants' Exhibit 6.")

We again renew our former demand for any and all correspondence that took place by telegraph or by post or through any other medium between W. R. Grace & Co., Bartlett & Co., Captain Rennie, H. D. Hylton, Fraser River Lumber Company—particularly the Fraser River Lumber Company, Ltd., and McCabe & Hamilton, in addition to that which has

been offered. I suppose it will be admitted that a demand for these documents was made on May 12th?

Mr. FRANK.—Oh, yes. I have made my return. There is no use going over that all the time. You made a demand and I have given answer to what I have done with respect to it.

Mr. HENGSTLER.—If you have any correspondence with the mill will you let us have it?

Mr. FRANK.—If I have any correspondence between Grace & Co. and the mill that is germane to this case you are entitled to it.

Mr. HENGSTLER.—Or the captain and the mill, or the agent of Grace & Co. and the mill?

Mr. FRANK.—Anything that is germane to this case, Mr. Hengstler. [48]

Mr. BELL.—Or which may be germane to it.

Mr. FRANK.—I have something here now between the captain and the mill.

Mr. HENGSTLER.—We ask for the production of that.

Mr. FRANK.—And here is another. They ought to be in your possession. Those are all to the captain.

Mr. BELL.—I think that is all. We will look these over.

The COURT.—We will take a recess now until two o'clock.

(A recess was here taken until two o'clock P. M.)

**[Proceedings had as to Certain Offers in Evidence,
etc.]**

Mr. BELL.—There is just one thing I want to call

attention to before submitting the case. It is alleged in the first paragraph that libellants were and are now doing business in the city of Hamburg, Empire of Germany, as copartners under the firm name and style of Knohr & Burchard, and were and now are the owners of the steel ship called the "Schwarzenbek." That is denied. Will that be admitted, Mr. Frank, or do you want still to deny that?

Mr. FRANK.—I don't know anything about them.

Mr. BELL.—The proof of ownership is the charter-party which has been offered in evidence, by which the respondent Grace & Co. contracted with the owners of the vessel. That is sufficient evidence to estop them from denying the ownership of Knohr & Burchard.

Then the only matter of any importance here is as to whether or not the libellants, Elvers and Zimmer constituted that firm of Knohn & Burchard; for the purpose of proving that those people were the members of that firm, I offer in evidence a power of attorney executed by them, before a notary, in Hamburg, certified by the United States Consul-general at Hamburg, that power of [49] attorney being a power of attorney to Mr. L. T. Hengstler.

Mr. FRANK.—I do not see how this is evidence of anything that binds us. This is a power of attorney executed by Mr. Hengstler and signed by these gentlemen. I object to its admission as incompetent and immaterial.

Mr. BELL.—It is certified to by a notary in Hamburg and also by the Consul-general.

Mr. FRANK.—He certifies to their signatures, but

there is no proof of the facts therein alleged.

Mr. BELL.—He certifies to them as “Shipowners, doing business in said city, as a copartnership under the name and style of Knohr & Burchard.”

The COURT.—The document will be admitted.

Mr. FRANK.—We note an exception.

(The document was here marked “Libellants’ Exhibit 7.”)

Mr. BELL.—And also a power of attorney executed in Hamburg and certified to by a notary public and also the Consul-general of Peru.

Mr. FRANK.—I make the same objection, your Honor; they are self-serving documents in any view that can be taken of them.

The COURT.—The objection is overruled.

Mr. FRANK.—We note an exception.

Mr. BELL.—And also another power of attorney executed in Hamburg, certified to by a notary public there, and also the Consul-general.

Mr. FRANK.—The same objection.

The COURT.—The same ruling.

Mr. FRANK.—Take an exception.

Mr. BELL.—Also two letters addressed to Andros & Hengstler, signed by Knohr & Burchard, on the letter-head having the firm [50] name and these two gentlemen’s names—one of them has, the other has not those names; it is signed by Knohr & Burchard, A. Zimmer, Jr.

Mr. FRANK.—The same objection.

The COURT.—I don’t think this is the best class of evidence on matters of this kind.

Mr. BELL.—We had anticipated that there would

be no objection, and that there would be no proof required on this point. If there is going to be that technical defense, all we have to do is to ask to amend the libel by having instead of the names Elvers & Zimmer, as libellants, the firm of Knohr & Burchard, and then under the power of attorney which has been offered in evidence here, Mr. Hengstler is authorized to sue in that name. If the court deems it necessary, we could amend.

The COURT.—I am simply saying that this is not the best character of proof. The matter is denied in the answer.

Mr. BELL.—It is denied, that is true, your Honor, but we assumed it was merely a formal denial, as usual.

Mr. FRANK.—I do not see how you could assume that.

Mr. HENGSTLER.—Mr. Frank, has it not been the universal practice in admiralty courts—in this admiralty court and in every admiralty court—to admit a commercial document that is signed *to* by our American Consulate as being sufficient proof? There are no technical rules in admiralty.

Mr. FRANK.—The Court has admitted it. We will argue the matter when it comes time to argue. I don't think there is any rule that a consulate's certificate can be substituted for proof of any fact alleged.

Mr. BELL.—In case the proof is not deemed sufficient, your Honor, we would then ask that the libel be considered as amended by the [51] substitution in there in lieu of the names of Elvers & Zimmer the

firm name of Knohr & Burchard, and that the power of attorney be considered as offered in evidence for the purpose of showing that Mr. Hengstler is authorized to institute this action in the name of Knohr & Burchard. And, as I say, the ownership by Knohr & Burchard of this vessel is sufficiently established by the fact that the charterers contracted with them as such.

Mr. FRANK.—I have no objection to their making any amendment they wish, but that does not change the rule of law regarding who the parties are that must sue.

Mr. BELL.—We can settle that point by taking a deposition, if necessary; and if the Court should deem this evidence insufficient, we ask for sufficient time in which to take a deposition and prove that fact.

The COURT.—The documents you have offered have been admitted. I cannot say at this time as to the sufficiency of them to establish the facts that are recited in them.

Mr. BELL.—I would ask permission, your Honor, if you deem that they do not sufficiently establish those facts, that we be permitted to take depositions, rather than delay the case by making that request now.

The COURT.—Do I understand that those letters have been offered?

Mr. BELL.—I offer those, your Honor, yes.

The COURT.—Then they will be marked "Libellants' Exhibit 8."

Mr. FRANK.—We note an exception.

(The document is here marked "Libellants' Exhibit 8.")

Mr. BELL.—That is all.

Mr. FRANK.—Now I offer in evidence the deposition of Andrew J. Stewart. (Reading.) [52]

I now offer in evidence the deposition of William C. W. Renny. (Reads.)

Now, I propose to offer in evidence the balance of the correspondence that the libellant left out this morning, of H. D. Hylton. I am not going to read it at the present time; I offer it and your Honor can consider it with the rest.

Mr. BELL.—We submit that it is immaterial, your Honor, that we have no objection to its going in together with the rest.

(The document was here marked Respondent's Exhibit "A.")

Mr. FRANK.—I now offer in evidence the protest of the master. I omit the formal part, and I will just read to your Honor the portion that relates to the subject matter. (Reads.)

(Document was here marked Respondent's Exhibit "B.")

I now offer in evidence the letter of the Fraser Mill Co. to Captain Flindt, under date of May 21, 1907; this is the letter I showed you gentlemen before the recess.

Mr. BELL.—I object to the introduction of this letter on the ground that it is immaterial, incompetent and irrelevant, and upon the further ground that the matter therein contained is a self-serving declaration on behalf of the charterers and their

mill; and upon the further, and the most serious ground of all, that it is plainly from the face of it hearsay.

Mr. FRANK.—The letter bears this superscription: “Fraser River Sawmills, Millside, B. C. Gentlemen. This is an exact copy of letter received from you by me on May 21, Stmt correct; F. Flindt.”

Mr. BELL.—I don’t know whether that is Captain Flindt’s signature, or not.

Mr. FRANK.—You can compare that with any paper you have got here.

Mr. BELL.—This writing is not his, is it?

Mr. FRANK.—No, the writing is not his; the signature is his. I say it is not his, because on the face of it it is not in his handwriting. [53]

Mr. BELL.—Who is the man who signed the letter?

Mr. FRANK.—Mr. Fowle.

Mr. BELL.—Is that his signature?

Mr. FRANK.—Now, Mr. Bell, you are asking me a good deal; I presume it is, because it is there.

Mr. BELL.—I have no knowledge of that letter. I never have seen it any way. And furthermore, the matter in it is clearly hearsay, and it is immaterial, irrelevant and incompetent. The letter is dated May 21, 1907, and is after this dispute was over, and it is simply directed to the captain, simply telling him that they are very much surprised at his claim.

Mr. FRANK.—We will read the letter and see what it is. It is part of the *res gestae*. It is in reply to his letter claiming demurrage before he went. The vessel was finished loading on May 15th. On

May 21 the captain delivered his bill. I will put them both in together; they are part of the same transaction, the letter and the answer.

Mr. BELL.—I renew my objection.

Mr. FRANK.—I offer Captain Flint's letter first.

The COURT.—Any objection to that?

Mr. BELL.—Yes, your Honor, the same objection, it is clearly immaterial, irrelevant and incompetent, and it is also hearsay as to the answer to that letter. Furthermore, it is not part of the *res gestae* in any manner or form. It is simply a dispute by these parties after the whole question is over as to whether there is or is not a claim. It is simply a matter of argument.

The COURT.—The objection is overruled. Flindt was the man on the ground who was acting, was he not?

Mr. FRANK.—Yes, your Honor, he was the master, (Reads.)

Now, this is the reply. (Reads.) [54]

Mr. BELL.—Your Honor, I would like to renew my objection to that letter on the ground that it is clearly a self-serving declaration and it is an endeavor to get into the record the evidence here of this man Fowle who it has been testified to is dead, without any opportunity on our part to cross-examine him. If that letter purported to be a notice or anything else that was material, it would be a different matter.

The COURT.—Whatever value that letter may have is derived from the acknowledgment of Captain Flindt.

Mr. BELL.—Well, your Honor, I object to the introduction of it on that ground, and on the ground that it has not been proved that Captain Flindt put his signature there after that writing was put there. This is the first time I ever saw that letter. It is not Captain Flindt's handwriting.

The COURT.—May I see it?

Mr. FRANK.—Yes, your Honor, and I wish you would compare it with the notice.

Mr. BELL.—The signature is his, but it is not his writing; it is Mr. Fowle's writing.

Mr. FRANK.—So far as the matter being written above it is concerned, that is defensive matter.

The COURT.—The document will be admitted.

(The document was here marked Respondent's Exhibit "C.")

Mr. FRANK.—I will add to that the protest that was attached to that letter; it also has Captain Flindt's signature there, the same as the other; it is part of the letter of May 21. I will have the three of them pinned together; that can be put right underneath the letter. [55]

[Testimony of Edward T. Ford, for Respondent.]

EDWARD T. FORD, called for the respondent, sworn.

Mr. FRANK—Q. Mr. Ford, what is your business?

A. I am sub-manager for W. R. Grace & Company.

Q. Were you in that position in the year 1907?

A. I was in the employ of W. R. Grace & Company, Chief Clerk in the lumber department.

Q. Do you remember the transaction with the ship

(Testimony of Edward T. Ford.)

“Schwarzenbek” at that time?

A. I remember of the transaction, I cannot remember all the details.

Q. Who paid the stevedores on that vessel?

A. The owners of the ship.

Q. What became of the cargo, whether it was retained by W. R. Grace & Company or sold?

A. It was sold.

Q. And the bill of lading—

Mr BELL.—(Intg.) Just a moment. That is objected to, your Honor, as being immaterial and irrelevant; I ask that the answer be stricken out.

Mr. FRANK.—It cannot be immaterial in the face of the argument that is made that if we are not liable under the charter-party we are liable under the bill of lading. I want to show that the bill of lading was indorsed and transferred to the buyer.

The COURT.—The objection is overruled.

A. I cannot recall whether the bill of lading was issued to order, or issued to W. R. Grace & Company, that is, consigned to order or consigned to W. R. Grace & Company. If it was consigned to order our usual course would be to indorse the bill of lading and forward it to our house on the West Coast who would in turn deliver the bill of lading to the buyer.

Mr. FRANK.—Q. Do you recall whether the cargo was sold before [56] the ship left Port Townsend?

A. No, I cannot recall that; I could not say positively, but I think without doubt it was.

Mr. BELL.—It may be taken, your Honor, that

(Testimony of Edward T. Ford.)

the objection is made to all this line of testimony and an exception noted?

The COURT.—Yes.

Mr. FRANK.—Q. Have you any papers or records in your office pertaining to this outside of what you passed over to Mr. Hengstler?

A. I think that is a complete record.

Mr. FRANK.—Take the witness.

Mr. BELL.—No questions.

**[Proceedings Had as to Certain Offers in Evidence,
etc.]**

Mr FRANK.—Now, if your Honor please, I am going to offer in evidence a sworn statement of Mr. W. P. Fowle, made before a Notary Public at Vancouver, and vided by the Peruvian Consul at Vancouver. In making this offer I will state your Honor that I am doing it because while my idea of it is that such documents are not admissible in evidence, still however as your Honor has admitted documents of that sort in evidence in this case over my objection, I understand that to be the rule that your Honor is following, and for that reason I offer it.

The COURT.—What is it?

Mr. FRANK.—It is a sworn statement by W. P. Fowle, made before a Notary Public in British Columbia and vided by the Consul of Peru at Vancouver, British Columbia. I want to show it to the other side and then I will read it.

Mr. BELL.—What is the purpose of the offer, to prove the facts which are related here?

Mr. FRANK.—Certainly.

Mr. BELL.—Mr. Fowle is dead and there is no ground that I know of by which this can be offered in evidence. The Notary does not certify that the facts are correct. He simply certifies to the signature [57] to the document. As to that I have no doubt whatever, but as to this manner of proving the facts which Mr. Fowle sets forth I object to as clearly hearsay and incompetent.

Mr. FRANK.—It is exactly on the same footing as the other documents that were offered by the other side to prove the fact of partnership.

The COURT.—The objection is sustained.

Mr. FRANK.—We take an exception. In order that we may get the nature of the document in the record for the purpose of our offer in case that the exception is good I would like to pass it to the Reporter and have it copied in the record.

The COURT.—No objection to that.

Mr. HENGSTLER.—Can I read it, Mr. Frank?

Mr. FRANK.—You can read it, certainly.

Now, I don't wish to bother the Court with anything further on this matter, but my recollection is the gentleman on the other side said that this was a self-serving declaration. Mr. Fowle and the Fraser Lumber Company are not the respondents here.

The COURT.—I understand that.

(The document referred to is as follows:)

**[Sworn Statement of W. P. Fowle, Dated June 28,
1907.]**

“Dominion of Canada,
Province of British Columbia,
Port of Vancouver.

W. B. Fowle, being first duly sworn deposes and says: That he has made and executed an affidavit in the matter of the claim of the Master of the ship ‘Schwartzembek’ for demurrage; that he makes this affidavit as a supplement thereto.

That on or about the 13th day of March, 1907, R. Collister, a duly appointed and qualified surveyor, mentioned in said charter, did hand to and deliver to this affiant a certain Preliminary Loading Certificate, relative to said ship, and did say to this affiant that said certificate was not to become effective till one week later than said 13th day of [58] March, 1907, namely not before the 20th day of March, 1907, at which date, said surveyor informed this affiant, said vessel would probably be ready for loading cargo agreeable to terms of charter. That during the period between the 13th day of March, and the 22d thereof said master and crew were engaged in discharging and trimming ballast, and rigging up for cargo.

That at the expiration of the time mentioned by said surveyor for said certificate becoming effective said Master, agreeable to said instructions from said surveyor, did present to this affiant on the 21st day of March, 1907, a certain written notice advising

that his said ship was in readiness to load cargo, and which notice was accepted agreeable to terms of said charter, and lay days began in accordance therewith.

That it was self-evident that said vessel was not ready for cargo at any date earlier than said 21st day of March, 1907, for the reason that said master did not demand or ask for cargo till the said 21st day of March, and the lay days began thereafter as provided by charter.

Dated this 28th day of June, 1907, at Vancouver, B. C.

W. P. FOWLE.

Sworn before me at the city of Vancouver, in the Province of British Columbia, this 28th day of June, 1907.

[Seal]

D. S. WAUBUSLYE,

A Notary Public in and for the Province of British Columbia.

V'r B. C.

[Seal]

ROB'T JACKSON,

Consul del Peru, en Vancouver, B. C."

Mr. FRANK.—Now, I make an offer of a letter dated April 2d, 1907, from Mr. Fowle to Captain Flindt which on the face of it appears to be a reply to a letter written by Captain Flindt. While the gentlemen are examining that, I will offer another copy of the letter which was offered this morning by the libelants, a letter [59] by Captain Flindt to Captain W. C. W. Renny, which your Honor admitted upon the ground that it carries the imprint of Grace & Company on the top; this is for the purpose of showing that it was in fact a copy of a letter

furnished them by Knohr & Burchard. It is to show that my construction of that other letter is correct.

Mr. HENGSTLER.—You mean to say it was furnished to us by Knohr & Burchard?

Mr. FRANK.—No, it was furnished to W. R. Grace & Company and that it passed from W. R. Grace & Company to you.

Mr. BELL.—The letter which Mr. Frank is about to offer in evidence signed by Mr. Fowle I object to upon the ground it is immaterial, irrelevant and incompetent and also upon the ground it is hearsay and endeavoring to get before the Court facts stated by this witness without giving us an opportunity to cross-examine him. It does not purport to be a notice of any kind and it is simply his view of the facts.

Mr. FRANK.—The only question is whether the letter is competent. It is a letter written to Captain Flindt in reply to a letter from Captain Flindt on the question of the trouble with the stevedores.

Mr. BELL.—Is that letter in evidence, Mr. Frank?

Mr. FRANK.—No, it is not. I don't know where it is. I will read this letter and then your Honor can determine the question. (Reads.)

The COURT.—The objection is overruled.

(The document was here marked Respondent's Exhibit "D.")

Mr. FRANK.—I offer another document now which was attached to that letter. It is another statement by W. P. Fowle, sworn to before a Notary Public in British Columbia and vised by the Consul of Peru at Vancouver. I assume your Honor will

make the same ruling. And I want it to appear in the record for the purpose of the offer.

The COURT.—Yes. This other letter that you offered as being a copy [60] or similar to the one already introduced in evidence will be admitted for whatever weight it may attach to your contention.

(The document was here marked Respondent's Exhibit "E.")

(The document requested to be inserted in the record is as follows:)

[Sworn Statement of William P. Fowle, Dated June 10, 1907.]

"IN THE MATTER of the Charter of the Steel Ship 'Schwarzenbek' to W. R. Grace & Co., Dated 16th day of August, 1906.

I, WILLIAM P. FOWLE, of Millside, in the Province of British Columbia, Manager of the Fraser River Sawmills, Limited, a body corporate, make oath and say:—

1. That I was the manager of the Fraser River Sawmills, Limited, at Millside, British Columbia, during the months of March, April and May, 1907, and have full knowledge of the matters hereinafter deposed to.

2. That I received notice that the ship "Schwarzenbek" would be ready to receive cargo on the 21st day of March, 1907, which said notice was signed by F. Flindt, master, but that the vessel was not rigged for taking in lumber until the morning of March 22d, and therefore in accordance with the terms of the charter the lay days did not commence until the 23d, being 24 hours after the vessel was at loading place

ready to receive cargo.

3. That at all times sufficient lumber was at the wharf cut ready to be loaded on the said ship, but that at one o'clock on April 23d there was a strike of the longshoremen employed by the stevedores, which delayed the loading of the said ship as set out in the protest served on the said Fraser River Saw-mills, Limited. That this was not a fault of the said mill company is shown by the fact that when the strike was settled and the loading of the ship was proceeded with the [61] mill company had over 400,000 feet of lumber on the wharf ready for loading on the said vessel, and that when the loading of the said vessel was completed over 70,000 feet of lumber was left in her berth cut for her order. At no time during the loading of the said ship was her loading delayed by reason of a shortness of supply of lumber to be placed in her.

4. That besides the Sundays after the 22d March, there were two public holidays, to wit, Good Friday and Easter Monday, occurring respectively on March 29th, and April 1st, so that the lay days did not expire until 29th April, had there been no delays occasioned by the ship, and that several times during the loading of the ship there was trouble between the captain and the stevedores, which necessitated delay in loading said ship, and that the captain of the said ship was on the 2d day of April notified in writing in respect thereof under date of the 2d day of April, 1907, a copy of which letter is hereto annexed and marked 'A.'

5. That the captain of the said ship at various

times said to me that he knew the ship had no claim against the Fraser River Sawmills, Limited, for demurrage and such admission was also made by the mate of said ship to me, and no daily notice or any notice, save and except the protest herein, was ever served by or on behalf of the said ship on the said Fraser River Sawmills, Limited.

WILLIAM P. FOWLE.

Sworn to before me at the city of Vancouver, in the Province of British Columbia, this 10th day of June, 1907.

D. J. BOWEN,

A Notary Public within British Columbia.

ROB'T. JACKSON, (Consular Seal)

Consul del Peru en Vancouver."

Mr. FRANK.—That is our case. [62]

[Motion to Amend Libel, etc.]

Mr. BELL.—Now, at this time, your Honor please, I will ask to amend the libel to conform to the proofs in the following respects: It appears from the protest that Mr. Frank has offered in evidence here that the ship arrived at Royal Roads on March 2d; it also appears from the deposition of Captain Flindt that she was there on March 2d, and that on March 2d he wired to W. R. Grace & Co. for orders pursuant to the charter-party, and notifying them that he was at Royal Roads. It also appears that on March 4th—and by the way, March the 2d was a Saturday; on March 4th, which was Monday, at 4:30 P. M., there was a notification to the charterers in San Francisco of the arrival, as is shown by the telegram;

that telegram was the captain's telegram evidently sent on March 2d in Royal Roads and arrived here in San Francisco; so that at that time, March 4th, at 4:30 P. M., the charterers had actual notice that the vessel was at Royal Roads. The telegrams show that the next thing that occurred was that on March 6th, which was Wednesday, at 4:30 P. M., the 48 hours, Sundays and legal holidays excepted, after the receipt of the captain's notification expired, that is to say, that notification was received by W. R. Grace & Co., on March 4th, at 4:30 P. M.; after they received that notification, they had 48 hours within which to give orders to the captain as to the loading mill. It appears that they did not give him any orders whatsoever within those 48 hours, and consequently, according to the provisions of the charter-party, after March 6th at 4:30 P. M., the lay days began to count.

The COURT.—You have had these documents in your possession all this time?

Mr. BELL.—But we were unable to say, until the protest was offered, whether those were the facts, or not. It now appears to be the fact that the master was at Royal Roads at that time, [63] and from the documents offered by the other side, and as shown by the deposition taken, that he notified W. R. Grace & Co. at that time, and it appears from the telegrams when they received the notice. We were unable prior to this time to know that those were the facts. It now appears that those are the facts without dispute.

Mr. FRANK.—I was just waiting for you to say

that. That is just where we differ. . The evidence shows conclusively that they received the notice on March 4th and on March 6th they designated Mill-side. Your Honor will find it over and over again in the evidence. The mere fact of what the captain put in his protest is not binding on us.

The COURT.—You can amend.

Mr. FRANK.—They can amend all they please, so far as I am concerned.

The COURT.—You can amend, but I am not admitting by permitting you to amend that it is an amendment to conform to the proof, because I am not saying now what the proof is.

Mr. BELL.—I understand, your Honor, but I may have permission to amend to what I think conforms to the proof.

The COURT.—Yes.

Mr. BELL.—I can prepare that amendment and hand it to your Honor and a copy of it to Mr. Frank. That will be all.

(The cause was thereupon submitted on briefs to be filed within certain periods to be agreed upon by counsel.)

(Here follow copies of exhibits.)

[Endorsed]: Filed Nov. 1, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [64]

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**(Answers of Witness, Renny, to Direct, Cross, and
Redirect Interrogatories.)**

BE IT REMEMBERED, that on the tenth day of April, 1914, at Seattle, in the State of Washington, there appeared before me N. W. Bolster, a Notary Public, at my office at No. 707 Lowman Building, Seattle, Washington, W. C. W. Renny, a witness produced on the part of respondent in a certain cause now pending in the District Court of the United States in and for the Northern District of California, Division One, wherein Martin H. A. Elvers and Frederic A. E. Zimmer are libelants, and W. R. Grace & Co., a Corporation, is respondent, being numbered in said court No. 13,980, and having been first duly cautioned to testify to the truth, the whole truth, and nothing but the truth, said witness did answer said several interrogatories, cross-interrogatories and redirect interrogatories as follows:

[Deposition of W. C. W. Renny, for Respondent.]

WILLIAM C. W. RENNY, (of Seattle), produced as a witness on behalf of respondent, being first duly cautioned and sworn, doth depose and testify as follows:

ANSWERING UNTO THE FIRST DIRECT INTERROGATORY, he saith:

William C. W. Renny; 53 years of age; marine expert.

ANSWERING UNTO THE SECOND DIRECT INTERROGATORY, he saith:

I was manager for the stevedoring firm of McCabe and Hamilton, incorporated. [65]

ANSWERING UNTO THE THIRD DIRECT INTERROGATORY he saith:

Yes.

ANSWERING UNTO THE FOURTH DIRECT INTERROGATORY he saith:

I was manager for the stevedoring firm of McCabe & Hamilton, who were loading the vessel at the time.

ANSWERING UNTO THE FIFTH DIRECT INTERROGATORY he saith:

In the early part of March, 1907.

ANSWERING UNTO THE SIXTH DIRECT INTERROGATORY he saith:

Yes.

ANSWERING UNTO THE SEVENTH DIRECT INTERROGATORY he saith:

Answering the first part of the question, I would say that the trimming of the vessel in accordance with the instructions of the surveyor was finished

(Deposition of William C. W. Renny.)

on the twenty-first day of March, 1907. The latter part of the question is not intelligible to me.

ANSWERING UNTO THE EIGHTH DIRECT INTERROGATORY he saith:

I had just a general conversation with the master concerning the loading of the ship about the sixteenth of March, 1907. I could not state anything in particular that took place, any more than that it was just the general chat which would occur between the stevedore and the master of a ship.

ANSWERING UNTO THE NINTH DIRECT INTERROGATORY he saith:

She was having the ballast trimmed by her crew.

ANSWERING UNTO THE TENTH DIRECT INTERROGATORY he saith:

On the twenty-first of March, 1907 he asked for a few men to assist in rigging the ship for cargo.

ANSWERING UNTO THE ELEVENTH DIRECT INTERROGATORY he saith:

Yes there was such a custom.

ANSWERING UNTO THE TWELFTH DIRECT INTERROGATORY he saith:

The custom was for the stevedores to rig the ship, and to charge for so doing. [66]

ANSWERING UNTO THE THIRTEENTH DIRECT INTERROGATORY he saith:

Five or six years previous to 1907.

ANSWERING UNTO THE FOURTEENTH DIRECT INTERROGATORY he saith:

Yes, I believe he did. Of course, we were not doing it for nothing, but there is no documentary evi-

(Deposition of William C. W. Renny.)

dence now in existence on that subject for the reason that the stevedoring firm of McCabe & Hamilton sold out its business several years ago.

ANSWERING UNTO THE FIFTEENTH DIRECT INTERROGATORY he saith:

The rigging of the vessel was finished on March 21, 1907.

ANSWERING UNTO THE SIXTEENTH DIRECT INTERROGATORY he saith:

I do not know.

ANSWERING UNTO THE SEVENTEENTH DIRECT INTERROGATORY he saith:

March 22, 1907.

ANSWERING UNTO THE EIGHTEENTH DIRECT INTERROGATORY he saith:

No.

ANSWERING UNTO THE NINETEENTH DIRECT INTERROGATORY he saith:

No.

ANSWERING UNTO THE TWENTIETH DIRECT INTERROGATORY he saith:

I cannot identify the document shown me. Respondent's Exhibit "A," while I have no doubt but that it is the notice I never saw the same.

ANSWERING UNTO THE TWENTY-FIRST DIRECT INTERROGATORY he saith:

Yes, the master stopped the work and prevented us from loading any more cargo, from the first to the third of April, 1907.

(Deposition of William C. W. Renny.)

ANSWERING UNTO THE TWENTY-SECOND
DIRECT INTERROGATORY he saith:

He stated that he objected to the quality of the lumber that he was receiving from the mill.

ANSWERING UNTO THE TWENTY-THIRD
DIRECT INTERROGATORY he saith:

He withdrew his objections.

ANSWERING UNTO THE TWENTY-FOURTH
DIRECT INTERROGATORY he saith:

He resumed the loading on the afternoon of April 3, 1907. He [67] took on board the same cargo that he had objected to receiving on April 1, 1907.

ANSWERING UNTO THE TWENTY-FIFTH
DIRECT INTERROGATORY he saith:

Yes, they entered upon a strike on April 23, 1907, demanding increased wages and shorter hours.

ANSWERING UNTO THE TWENTY-SIXTH
DIRECT INTERROGATORY he saith:

The master tried to load the vessel with the crew and so continued for two or three days.

ANSWERING UNTO THE TWENTY-SEVENTH DIRECT INTERROGATORY he saith:

The strike was settled and adjusted on May 11, 1907, and the loading was resumed by the stevedores on said date.

ANSWERING UNTO THE TWENTY-EIGHTH
DIRECT INTERROGATORY he saith:

Every effort was made to secure other labor, but we were prevented by the coercion and intimidation from the strikers as usual in such strikes.

(Deposition of William C. W. Renny.)

ANSWERING UNTO THE TWENTY-NINTH
DIRECT INTERROGATORY he saith:

The master said nothing on the subject that I recollect.

ANSWERING UNTO THE THIRTIETH DIRECT
INTERROGATORY he saith:

Yes.

ANSWERING UNTO THE THIRTY-FIRST
DIRECT INTERROGATORY he saith:

Yes, he interfered. There was no apparent cause for his interference. I could not state just the length of time that it was delayed—he was one of the butting-in sort of chaps.

ANSWERING UNTO THE THIRTY-SECOND
DIRECT INTERROGATORY he saith:

May 15, 1907.

ANSWERING UNTO THE THIRTY-THIRD
DIRECT INTERROGATORY he saith:

I do not recollect what holidays intervened; I presume there must have been some, because Easter and Good Friday would come in and I think Easter Monday and Good Friday are celebrated as holidays in British Columbia.

ANSWERING UNTO THE THIRTY-FOURTH
DIRECT INTERROGATORY he saith:

No. [68].

ANSWERING UNTO THE THIRTY-FIFTH
DIRECT INTERROGATORY he saith:

The master.

(Deposition of William C. W. Renny.)

ANSWERING UNTO THE THIRTY-SIXTH
DIRECT INTERROGATORY he saith:

I know that Mr. Fowle has passed away. I have not heard of Mr. Carter for six years and do not know where he is at this time.

ANSWERS TO CROSS-INTERROGATORIES.

ANSWERING UNTO THE FIRST CROSS-INTERROGATORY he saith:

I think the notice was given in writing; I could not say whether it was in writing or by wire, but I think it was given in writing. The firm of McCabe & Hamilton wound up their operations in British Columbia years ago and sold out their business and I do not know where the notice can be found now.

ANSWERING UNTO THE SECOND CROSS-INTERROGATORY he saith:

The firm of McCabe & Hamilton had done work for the charterer, W. R. Grace & Co., for several years. I was the firm's Hawaiian partner and I was down in Honolulu for five years and a half and I never wrought for them on Puget Sound before this time. I had previously loaded lumber from Millside in other vessels, not chartered by Grace & Co., however.

ANSWERING UNTO THE THIRD CROSS-INTERROGATORY he saith:

On March 13, 1907, I was somewhere in British Columbia, probably at Millside. My first visit to Millside, Fraser River, was towards the end of January, 1907.

(Deposition of William C. W. Renny.)

ANSWERING UNTO THE FOURTH CROSS-INTERROGATORY he saith:

Millside is a mill town; at that time it consisted of a moving population of workmen composed of mill employees, longshoremen, etc. At that time, I presume, it was considered a townsite. I should judge it was about seventeen miles from the mouth of the Fraser River; about from fourteen to seventeen miles from Vancouver; about eighty-five miles from Royal Roads; about ninety miles from Port Townsend. It could be reached from Vancouver in about fifty minutes [69] on the interurban electric cars. From Royal Roads, with the service at that time one would have to leave Victoria about midnight, arriving in Vancouver at seven o'clock A. M. and thence to Millside by electric tram. From Port Townsend one would have to go via Seattle and thence to Vancouver or via Victoria and thence to Vancouver. There was no direct service to Millside. From the mouth of the Fraser River it would take two or three hours, but there was no regular means of transportation.

ANSWERING UNTO THE FIFTH CROSS-INTERROGATORY he saith:

I do not know when the ship arrived at Millside nor when she moored alongside the wharf, but it was some time previous to March 16, 1907.

ANSWERING UNTO THE SIXTH CROSS-INTERROGATORY he saith:

I do not know whether there were stevedores at

(Deposition of William C. W. Renny.)

Millside on the day of the ship's arrival. The stevedores who loaded the ship arrived some time previous to March 21, 1907. We had men working nearly all the time at Millside and we just detailed men to work on the different ships or whatever work we were doing. Henry Carter was the foreman in charge of the longshoremen who loaded the ship, and I was the manager.

ANSWERING UNTO THE SEVENTH CROSS-INTERROGATORY he saith:

I have stated in my answer to the seventh direct interrogatory that that part of the question was unintelligible to me.

ANSWERING UNTO THE EIGHTH CROSS-INTERROGATORY he saith:

It is most likely that the conversation referred to took place on board the ship. I cannot state positively as to the place.

ANSWERING UNTO THE NINTH CROSS-INTERROGATORY he saith:

The custom or usage referred to would apply to both deep-water lumber carriers or to coastwise vessels, provided that stevedores were engaged. Of course, a great many of the coastwise vessels load their cargo with their own crew. [70]

ANSWERING UNTO THE TENTH CROSS-INTERROGATORY he saith:

They have to rig span, fall, and burton. The stevedores perform this work and make extra charge for doing the same.

(Deposition of William C. W. Renny.)

ANSWERING UNTO THE ELEVENTH CROSS-INTERROGATORY he saith:

Over her side.

ANSWERING UNTO THE TWELFTH CROSS-INTERROGATORY he saith:

Millside; Lester W. David, owner.

ANSWERING UNTO THE THIRTEENTH CROSS-INTERROGATORY he saith:

The same stevedoring firm helped with the rigging for loading the lumber, at the request of the captain. Span, fall and sliding burton was the rigging used. Rigging was commenced on March 21, 1907.

ANSWERING UNTO THE FOURTEENTH CROSS-INTERROGATORY he saith:

I understand "ready to receive cargo" as used in said interrogatories means to have ballast trimmed and gear rigged to the satisfaction of the surveyor.

ANSWERING UNTO THE FIFTEENTH CROSS-INTERROGATORY he saith:

I understand McCabe & Hamilton to have been "the contracting stevedores." I would understand "want of readiness" to mean not having sufficient men and equipment to carry out the work, but there was not any want of readiness in this case.

ANSWERING UNTO THE SIXTEENTH CROSS-INTERROGATORY he saith:

I have not answered the twentieth direct interrogatory except to state that I had not seen the notice herein referred to.

(Deposition of William C. W. Renny.)

ANSWERING UNTO THE SEVENTEENTH
CROSS-INTERROGATORY he saith:

I have stated that I did not see any such notice.

ANSWERING UNTO THE EIGHTEENTH
CROSS-INTERROGATORY he saith:

On March 21, 1907, the master of the ship asked for some men to assist in rigging to receive cargo. He did not say anything to me that I can recall as to the ship having waited to be loaded. [71]

ANSWERING UNTO THE NINETEENTH
CROSS-INTERROGATORY he saith:

I cannot state. I presume they had plenty of lumber ready before the ship was ready, as they usually have in such cases.

ANSWERING UNTO THE TWENTIETH
CROSS-INTERROGATORY he saith:

I have no such letters or notices for the reasons stated in my answer to the fourteenth direct interrogatory and to the first cross-interrogatory.

ANSWERING UNTO THE TWENTY-FIRST
CROSS-INTERROGATORY he saith:

I recollect no particular conversation, request, order or communication. I was in daily contact with the manager of the mill and my communications and conversations with him would be in the nature of such general conversations and communications as would take place between us concerning such work.

ANSWERING UNTO THE TWENTY-SECOND
CROSS-INTERROGATORY he saith:

The firm had previously loaded deep-water lum-

(Deposition of William C. W. Renny.)

ber ships at the same wharf.

ANSWERING UNTO THE TWENTY-THIRD
CROSS-INTERROGATORY he saith:

I am unable to do this for the reasons stated in my answers to the fourteenth direct interrogatory and the first cross-interrogatory.

ANSWERING UNTO THE TWENTY-FOURTH
INTERROGATORY he saith:

I have answered this in my answer to the last preceding interrogatory.

ANSWERING UNTO THE TWENTY-FIFTH
CROSS-INTERROGATORY he saith:

He stated that the quality of the lumber was not suitable.

ANSWERING UNTO THE TWENTY-SIXTH
CROSS-INTERROGATORY he saith:

I cannot recall.

ANSWERING UNTO THE TWENTY-
SEVENTH CROSS-INTERROGATORY he
saith:

I would understand "the time said master gave notice of readiness to receive cargo" to mean the time that he served written notice on the mill. I would understand "the normal rate per day" to be about from fifty to sixty thousand feet per day. We knew the [72] quantity of lumber by the daily returns we received from the mill every night.

ANSWERING UNTO THE TWENTY-EIGHTH
CROSS-INTERROGATORY he saith:

I know it because I was there when the strike took place.

(Deposition of William C. W. Renny.)

ANSWERS TO REDIRECT INTERROGATORY.
ANSWERING THE FIRST REDIRECT INTERROGATORY he saith:

The trimming of the vessel in accordance with the instructions of the surveyor, and the rigging of the vessel to receive her cargo was completed and concluded on March 21, 1907.

W. C. W. RENNY.

Subscribed and sworn to before me this tenth day of April, A. D. 1914.

N. W. BOLSTER,
Notary Public in and for the State of Washington,
Residing at Seattle. [73]

**[Certificate of Commissioner to Deposition of W. C.
W. Renny.]**

Seattle, Washington,
United States of America,—ss.

I, N. W. Bolster, a Notary Public, duly commissioned and sworn, in and for the State of Washington, residing at Seattle, Washington, DO HEREBY CERTIFY:

That pursuant to the Stipulation for the taking of the deposition of W. C. W. Renny, before me at Seattle, Washington, and the Order thereon dated March 24, 1914, and pursuant to the Commission mentioned in said stipulation and also attached hereto, W. C. W. Renny, one of the witnesses named in said commission and the witness named in the said stipulation and order dated March 24, 1914, appeared before me on the tenth day of April, 1914,

when I took, completed and reduced to writing his answers or depositions to the interrogatories, direct, cross, and redirect, to the said commission attached, the same answers being the same hereto attached.

AND I FURTHER CERTIFY: That previous to such answers or depositions being taken, I duly administered to the said witness the following oath:

“I do solemnly swear that upon the interrogatories, direct, cross and redirect that shall be propounded to me, I shall true answer make, and that I shall speak the truth, the whole truth, and nothing but the truth, so help me God.”

IN TESTIMONY WHEREOF, I, the said Notary Public, have hereunto subscribed my name and affixed my Official Seal at Seattle, Washington, this tenth day of April, 1914.

[Notary Seal]

N. W. BOLSTER. [74]

*In the District Court of the United States in and for
the Northern District of California*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Stipulation for Withdrawal of Commission Depositions, etc., for Taking of Testimony W. C. W. Renny.

IT IS HEREBY STIPULATED by and between

the respective parties hereto that the commission to take the depositions of A. J. Stewart, W. P. Fowle, W. C. W. Renny and Henry Carter, issued in the above-entitled cause on the 20th day of February, 1914, together with the interrogatories, exhibits and deposition which has been returned to the Court in said cause, may be withdrawn from the files of said Court after having been opened and filed herein, and that the said commission may be forwarded to N. W. BOLSTER, a Notary Public at Seattle, Washington, for the purpose of taking the testimony of W. C. W. Renny at Seattle, Washington, instead of at the place and in the matter provided in the commission to take said depositions, and that when so taken, the commission, together with all the testimony, may be returned to the Court above named and filed in the above-entitled cause with the same force and effect as if taken as originally provided in the commission and stipulations for taking the same, and any and all objections that the said deposition was taken as herein provided are hereby waived.

ANDROS & HENGSTLER,

Proctors for Libelants.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Respondent.

Dated March 24, 1914.

So ordered.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Mar. 25, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [75]

**Exhibit "A" (Attached to Depositions of W. C. W.
Renny et al.).**

KNOHR & BURCHARD NFL., HAMBURG.

Scotts Code 1890.—A B C Code 1901.

Telegramm-Adresse: Knohrhard, Hamburg,

Rec'd Nov. 20, 1908.

Ans'd

Millside, Den 21 Marz, 1907.

Schiff: SCHWARZENBEK.

RHEDEREI-ABTHEILUNG

(Flag)

eis.o.stahl	Tons Schwergut
4 M.Bark "Reinbek"	ca. 4500
4 M.Bark "Schurbek"	" 4000
4 M.Bark "Elbek"	" 3900
4 M.Bark "Schiffbek"	" 3900
4 M.Bark "Wandsbek"	" 3700
4 M.Bark "Barmbek"	" 3350
Vollschiff "Schwarzenbek"	" 3300
Vollschiff "Flottbek"	" 3075
Vollschiff "Tarpenbek"	" 3050
Barkschiff "Steinbek"	" 2700
Vollschiff "Rodenbek"	" 2600
Barkschiff "Osterbek"	" 2550

To the Manager of

The Millside Sawmill.

I beg you to inform that the German Ship
"Schwarzenbek" *nov* to lie at his place 9 days wait-
ing for stevedore. will be ready to receive cargo at

noon 21, of Marz 1907.

Yours verry truly,

F. FLINDT,

Master.

Vessel was not rigged for taking in lumber until the morning of March 22d.

(Notarial seal)

W. P. FOWLE.

N. B. Nur eine seite beschreiben.

Exhibit "A" introduced in evidence before me on the 20th day of March, 1914, under the Commission issued to me out of the United States District Court in and for the Northern District of California, Division One, in the case of Martin H. A. Elvers and Frederic A. E. Zimmer, Libelants, vs. W. R. Grace & Co., a Corporation, Respondent, No. 13,980, of certain witnesses therein named.

D. G. MARSHAL,

A Notary Public in and for the Province of British Columbia. [76]

[Deposition of A. J. Stewart, for Respondent.]

In the District Court of the United States in and for the Northern District of California, Division One.

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E. ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

(Deposition of A. J. Stewart.)

BE IT REMEMBERED that on the 20th day of March, 1914, at Vancouver, British Columbia, there appeared before me, David Gordon Marshall, a Notary Public in and for the Province of British Columbia, A. J. Stewart, a witness produced on the part of the respondent in a certain cause now pending in the District Court of the United States in and for the Northern District of California, Division One, wherein Martin H. A. Elvers and Frederic A. E. Zimmer are libelants, and W. R. Grace & Co., a corporation, is respondent, being numbered in said court No. 13,980, and *th* having been first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, said witness did answer said several interrogatories, cross-interrogatories and redirect interrogatories as follows:

(ANSWERS OF WITNESS STEWART TO
DIRECT, CROSS AND REDIRECT INTER-
ROGATORIES.)

A. J. STEWART, of city of Fraser Mills, being produced, sworn and examined doth depose and testify as follows:

ANSWERING UNTO THE FIRST DIRECT INTERROGATORY he saith:

Andrew J. Stewart; 46 years old; lumber inspector and foreman of mill.

ANSWERING UNTO THE SECOND DIRECT INTERROGATORY he saith:

Was foreman of mill of Fraser River Mills, Limited, at Millside.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE THIRD DIRECT INTERROGATORY he saith:

Yes. [77]

ANSWERING UNTO THE FOURTH DIRECT INTERROGATORY he saith:

Looked after the cutting of the lumber for her.

ANSWERING UNTO THE FIFTH DIRECT INTERROGATORY he saith:

Had no connection with the stevedoring firm.

ANSWERING UNTO THE SIXTH DIRECT INTERROGATORY he saith:

Had nothing to do with the stevedoring.

ANSWERING UNTO THE SEVENTH DIRECT INTERROGATORY he saith:

21st. March, 1907.

ANSWERING UNTO THE EIGHTH DIRECT INTERROGATORY he saith:

Had no conversation with master about loading.

ANSWERING UNTO THE NINTH DIRECT INTERROGATORY he saith:

Had no conversation.

ANSWERING UNTO THE TENTH DIRECT INTERROGATORY he saith:

There was no request made to me.

ANSWERING UNTO THE ELEVENTH DIRECT INTERROGATORY he saith:

There was no custom. Matter of contract between owners and charterers.

ANSWERING UNTO THE TWELFTH DIRECT INTERROGATORY he saith:

Answered by eleventh direct interrogatory.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE THIRTEENTH DIRECT INTERROGATORY he saith:

Have never been engaged in stevedoring.

ANSWERING UNTO THE FOURTEENTH DIRECT INTERROGATORY he saith:

Had nothing to do with the stevedoring.

ANSWERING UNTO THE FIFTEENTH DIRECT INTERROGATORY he saith:

Had nothing to do with the stevedoring.

ANSWERING UNTO THE SIXTEENTH DIRECT INTERROGATORY he saith:

21st March, 1907.

ANSWERING UNTO THE SEVENTEENTH DIRECT INTERROGATORY he saith:

22d March, 1907.

ANSWERING UNTO THE EIGHTEENTH DIRECT INTERROGATORY he saith:

No. [78]

ANSWERING UNTO THE NINETEENTH DIRECT INTERROGATORY he saith:

No.

ANSWERING UNTO THE TWENTIETH DIRECT INTERROGATORY he saith:

The document marked exhibit "A" is the notice served by the master on March 21st, 1907. I recognize the notice from having seen it at the time in the mill office.

ANSWERING UNTO THE TWENTY-FIRST DIRECT INTERROGATORY he saith:

Yes—during the first and second of April and up until noon of the third of April, 1907.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE TWENTY-SECOND
DIRECT INTERROGATORY he saith:

No statement made to me by the master.

ANSWERING UNTO THE TWENTY-THIRD
DIRECT INTERROGATORY he saith:

No statement made to me by the master.

ANSWERING UNTO THE TWENTY-FOURTH
DIRECT INTERROGATORY he saith:

Resumed loading at noon on 3d April, 1907, on same cargo as was being loaded when master stopped loading.

ANSWERING UNTO THE TWENTY-FIFTH
DIRECT INTERROGATORY he saith:

Yes, there was a strike on the 23d April, 1907—the men struck for higher wages and less hours.

ANSWERING UNTO THE TWENTY-SIXTH
DIRECT INTERROGATORY he saith:

The master started his crew loading cargo and continued doing so up to the 10th May, 1907.

ANSWERING UNTO THE TWENTY-SEVENTH DIRECT INTERROGATORY he saith:

11th May, 1907.

ANSWERING UNTO THE TWENTY-EIGHTH
DIRECT INTERROGATORY he saith:

Had nothing to do with the procuring of labor.

ANSWERING UNTO THE TWENTY-NINTH
DIRECT INTERROGATORY he saith:

Do not remember at this late date.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE THIRTIETH DIRECT
INTERROGATORY he saith:

Yes. [79]

ANSWERING UNTO THE THIRTY-FIRST DI-
RECT INTERROGATORY he saith:

The only time the master interfered was from the
first to the third of April previously mentioned.

ANSWERING UNTO THE THIRTY-SECOND
DIRECT INTERROGATORY he saith:

May 15th, 1907.

ANSWERING UNTO THE THIRTY-THIRD
DIRECT INTERROGATORY he saith:

Two holidays—Good Friday and Easter Monday—
29th March and first of April.

ANSWERING UNTO THE THIRTY-FOURTH
DIRECT INTERROGATORY he saith:

No.

ANSWERING UNTO THE THIRTY-FIFTH
DIRECT INTERROGATORY he saith:

Don't know.

ANSWERING UNTO THE THIRTY-SIXTH
DIRECT INTERROGATORY he saith:

Don't know where Mr. Renny is. I understand
Mr. Carter is dead. Mr. Fowle is dead.

ANSWERING UNTO THE FIRST CROSS-IN-
TERROGATORY he saith:

No notice given to me. Notice was given to the
manager of the mill.

ANSWERING UNTO THE SECOND CROSS-IN-
TERROGATORY he saith:

Had no connection with the stevedoring.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE THIRD CROSS-INTERROGATORY he saith:

January, 1906. Employed at Millside, Fraser River.

ANSWERING UNTO THE FOURTH CROSS-INTERROGATORY he saith:

Millside is situate on the north Bank of the Fraser River on a branch of the C. P. R. running from Westminster Junction to New Westminster—about 5 miles from New Westminster. Was neither town or city or subdivision of town but under Government control. About 19 miles distant from the mouth of the Fraser River. Distant from city of Vancouver about 35 miles by water and about 17 miles by railway. Distant from Royal Roads over 120 miles. Know nothing of the time taken to travel from places mentioned to Millside. [80]

ANSWERING UNTO THE FIFTH CROSS-INTERROGATORY he saith:

Arrived on or about the 13th day of March, 1907.

ANSWERING UNTO THE SIXTH CROSS-INTERROGATORY he saith:

Don't remember if there was a stevedore at Millside when the ship arrived. Carter was the name of the foreman.

ANSWERING UNTO THE SEVENTH CROSS-INTERROGATORY he saith:

Have never rigged a vessel for receiving cargo but am able to state when vessel is rigged for receiving cargo.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE EIGHTH CROSS-INTERROGATORY he saith:

Had no conversation.

ANSWERING UNTO THE NINTH CROSS-INTERROGATORY he saith:

Know of no custom. Only a matter of contract.

ANSWERING UNTO THE TENTH CROSS-INTERROGATORY he saith:

Know nothing about stevedoring work.

ANSWERING UNTO THE ELEVENTH CROSS-INTERROGATORY he saith:

Loaded over her side.

ANSWERING UNTO THE TWELFTH CROSS-INTERROGATORY he saith:

Mill had no name—owners' name Fraser River Mills, Limited—loaded at wharf of Fraser River Mills, Limited.

ANSWERING UNTO THE THIRTEENTH CROSS-INTERROGATORY he saith:

Had nothing to do with the stevedoring and do not remember.

ANSWERING UNTO THE FOURTEENTH CROSS-INTERROGATORY he saith:

I understood by "ready to receive cargo" that the tackle and things were all in place and I also had seen notice from the master that the ship was ready to receive cargo on that date.

ANSWERING UNTO THE FIFTEENTH CROSS-INTERROGATORY he saith:

The stevedores who have the contract for loading the vessel. I did not understand whose duty it was

(Deposition of A. J. Stewart.)

to rig the ship but after the ship was rigged on the 21st of March there was no delay on the part of the contracting stevedores except by strike.

ANSWERING UNTO THE SIXTEENTH CROSS-INTERROGATORY he saith:

I understand by "served upon the Mill" to be the delivery [81] of the notice by the master to the manager at the mill that the boat was ready to receive cargo.

ANSWERING UNTO THE SEVENTEENTH CROSS-INTERROGATORY he saith:

I had no notice either verbal or in writing and knew of no other notice being given to the mill than the notice of the 21st of March.

ANSWERING UNTO THE EIGHTEENTH CROSS-INTERROGATORY he saith:

Never was asked.

ANSWERING UNTO THE NINETEENTH CROSS-INTERROGATORY he saith:

The mill was ready to deliver whenever the ship was ready.

ANSWERING UNTO THE TWENTIETH CROSS-INTERROGATORY he saith:

The only notice that I know of is marked exhibit "A" to the twentieth interrogatory.

ANSWERING UNTO THE TWENTY-FIRST CROSS-INTERROGATORY he saith:

Had no transaction with the stevedores and was not present at any conversation between the manager of the mill and the representatives of the stevedores.

(Deposition of A. J. Stewart.)

ANSWERING UNTO THE TWENTY-SECOND
CROSS-INTERROGATORY he saith:

Do not know.

ANSWERING UNTO THE TWENTY-THIRD
CROSS-INTERROGATORY he saith:

Only notice is exhibit "A" to twentieth interrogatory.

ANSWERING UNTO THE TWENTY-FOURTH
CROSS-INTERROGATORY he saith:

Yes. Exhibit "A" to the twentieth interrogatory is the only notice or communication that I know of.

ANSWERING UNTO THE TWENTY-FIFTH
CROSS-INTERROGATORY he saith:

He objected to short lengths.

ANSWERING UNTO THE TWENTY-SIXTH
CROSS-INTERROGATORY he saith:

There were none.

ANSWERING UNTO THE TWENTY-SEVENTH
CROSS-INTERROGATORY he saith:

I understand by the expression "the time said master gave notice of readiness to receive cargo" the time when the master [82] gave the notice of the 21st of March. I do not remember at this late date the normal rate per day but being foreman of the mill I know there was no delay on the part of the mill.

ANSWERING UNTO THE TWENTY-EIGHTH
CROSS-INTERROGATORY he saith:

My source of knowledge is that I was present on the ground and knew from the stevedores themselves what the cause of the strike was.

ANSWERING UNTO THE FIRST REDIRECT
INTERROGATORY he saith:

21st March, 1907.

A. J. STEWART.

Examined, taken, reduced to writing and subscribed and sworn to by the said Andrew J. Stewart before me, at Vancouver, British Columbia, this 20th day of March, A. D. 1914.

(Notarial Seal) D. G. MARSHALL,
A Notary Public in and for the Province of British
Columbia.

**[Certificate of Commissioner to Deposition of A. J.
Stewart.]**

Vancouver, British Columbia,
County of Vancouver,—ss.

I, David Gordon Marshall, a notary public duly commissioned and sworn, at Vancouver, British Columbia,

DO HEREBY CERTIFY: That pursuant to the commission hereto attached, A. J. Stewart, one of the witnesses named in the said commission, appeared before me on the —— day of March, A. D. 1914, when I took, completed and reduced to writing his answers or depositions to the interrogatories, direct, cross and redirect, to the said commission attached, the same answers being the same hereto annexed.

AND I FURTHER CERTIFY: That previous to such answers or depositions being taken I duly administered to the said witness the following oath:

“I do solemnly swear that upon the interroga-

tories, direct, cross, and redirect that shall be propounded to me, I shall true answer make, and that I shall speak the truth, the whole truth, and nothing but the truth, so help me God.

IN TESTIMONY WHEREOF, I, the said notary public have hereunto subscribed my name and affixed my official seal at Vancouver, British Columbia, this 20th day of March, A. D. 1915.

D. G. MARSHALL, (Seal)

Notary Public in and for the Province of British Columbia. [83]

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY —No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E. ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondents.

Stipulation for Issuance of Commission to Take Testimony.

IT IS HEREBY STIPULATED that a commission may issue in the above-entitled cause, directed to any notary public at Victoria, British Columbia, to take the testimony of A. J. Stewart, W. P. Fowle, W. C. W. Renny and Henry Carter, upon such interrogatories direct, cross and redirect as the parties hereto may see fit to propound;

IT IS FURTHER STIPULATED that the said libelants shall serve upon the respondent, and file in said cause, its cross-interrogatories within two days from the date of receiving the direct interrogatories.

Dated February 17, 1914.

ANDROS & HENGSTLER,

Proctors for Libelants.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Respondent. [84]

*In the District Court of the United States in and for
the Northern District of California, Division
One.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Order for Issuance of Commission to Take
Testimony.**

Upon reading the stipulation hereto attached for the issuance of a commission to take testimony in the above-entitled cause,

IT IS HEREBY ORDERED that a commission be issued in this cause, out of this court, directed to any notary public at Victoria, British Columbia, to examine A. J. Stewart, W. C. W. Renny, W. P.

Fowle and Henry Carter, in accordance with said stipulation.

Dated February 20th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [85]

**[Direct Interrogatories to be Administered to A. J.
Stewart et al.]**

*In the District Court of the United States in and
for the Northern District of California, Division
One.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

DIRECT INTERROGATORIES to be administered to A. J. Stewart, W. P. Fowle, W. C. W. Renny and Henry Carter, witnesses to be produced, sworn and examined on behalf of the respondent in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States in and for the Northern District of California, Division One, wherein Martin H. A. Elvers and Frederic A. E. Zimmer are libelants, and W. R. Grace & Co., a corporation, is respondent:

(Deposition of A. J. Stewart.)

INTERROGATORIES TO BE PROPOUNDED
to

A. J. STEWART.

W. P. FOWLE.

W. C. W. RENNY.

HENRY CARTER.

FIRST INTERROGATORY: What is your name, age, and occupation?

SECOND INTERROGATORY: State what your occupation was in February, March, April and May, 1907.

THIRD INTERROGATORY: Do you remember the loading of the German ship "Schwarzenbek" at Millside, Fraser River, in the months of March, April and May, 1907?

FOURTH INTERROGATORY: If you shall state in answer to the foregoing interrogatory that you remember the loading of said vessel, state what, if any, connection you had therewith.

FIFTH INTERROGATORY: If in answer to the preceding interrogatory you shall state that you were either the manager or the foreman of the stevedoring firm that loaded said vessel at said time, [86] state when you were first notified by the charterer of the selection or nomination of your firm for that purpose.

SIXTH INTERROGATORY: State whether or not you were on the 13th day of March, 1907, ready and fully equipped to perform said service.

SEVENTH INTERROGATORY: State, if you know, on what date the trimming of the vessel

(Deposition of A. J. Stewart.)

in accordance with the instructions of the surveyor, and the rigging of her cargo was completed and concluded.

EIGHTH INTERROGATORY: When did you first have a conversation with the master of said vessel upon the subject of the loading of his vessel, and what, if anything, took place between you at said time.

NINTH INTERROGATORY: What was the vessel doing at the time you had said conversation?

TENTH INTERROGATORY: On what day did the master of said vessel first request of you to render any services to said vessel, and what was the nature of said request?

ELEVENTH INTERROGATORY: Was there at said time any custom or usage on the Pacific Coast Northern ports with reference to who shall perform the labor of rigging the vessel to take in lumber?

TWELFTH INTERROGATORY: If in answer to the preceding interrogatory you shall say there was, or is, such a custom, state what the same is.

THIRTEENTH INTERROGATORY: How long have you been engaged in said business in Northern ports?

FOURTEENTH INTERROGATORY: State whether or not the master of the vessel paid the stevedoring firm extra for the labor furnished to assist in rigging up the vessel to receive said lumber.

(Deposition of A. J. Stewart.)

FIFTEENTH INTERROGATORY: State when the rigging of said vessel for said purpose was concluded. [87]

SIXTEENTH INTERROGATORY: When did the master deliver notice of his readiness to receive the cargo.

SEVENTEENTH INTERROGATORY: When did the work of loading said vessel commence.

EIGHTEENTH INTERROGATORY: Was the vessel at any time ready to receive cargo before said last named date.

NINETEENTH INTERROGATORY: Was the vessel at any time preceding said date delayed by want of readiness upon the part of the contracting stevedores to commence the loading of said vessel.

TWENTIETH INTERROGATORY: Examine the document now exhibited to you and marked Respondent's Exhibit "A," and state whether or no that is the notice served by the master upon the mill on March 21, 1907, and state how and why you recognize the same as being such notice so delivered as aforesaid. Have the same identified by the signature of the commissioner and have it annexed to your deposition and returned herewith.

TWENTY-FIRST INTERROGATORY: Did the master at any time after commencing said loading stop and discontinue the work of loading said vessel; if so, state the date when he so stopped it, and how long he continued to so prevent the loading of said vessel.

(Deposition of A. J. Stewart.)

TWENTY-SECOND INTERROGATORY: If the master stated to you why he stopped said loading, state what he said upon the subject.

TWENTY-THIRD INTERROGATORY: When the master subsequently proceeded with the loading did he do so with or without insisting upon the objections he made to continuing the loading when he first stopped it.

TWENTY-FOURTH INTERROGATORY: When did he resume the loading, and what, if any, cargo did he take on board upon such resumption of the loading.

TWENTY-FIFTH INTERROGATORY: During the period of the loading of said vessel, state whether or no the longshoremen or stevedore's men engaged upon said loading entered upon a strike, and if so, [88] give the date upon which they entered upon said strike, and their reasons for the same.

TWENTY-SIXTH INTERROGATORY: When said strike occurred, what, if anything, was done toward proceeding with the said loading, and how long did said method of loading continue.

TWENTY-SEVENTH INTERROGATORY: When was said strike settled and adjusted, and when was said loading continued by the use of stevedores.

TWENTY-EIGHTH INTERROGATORY: During the time of said strike, what, if any, effort was made to secure and obtain other labor with which to resume said loading, and what, if any-

(Deposition of A. J. Stewart.)

thing, prevented such efforts from becoming effectual.

TWENTY-NINTH INTERROGATORY: Did the master of said vessel, during the time of such strike, give any expression of his views of the liability of the charterer to load said vessel during the term of said strike, and if so, what did he say upon the subject.

THIRTIETH INTERROGATORY: Were the contracting stevedores during all the time consumed in loading the said vessel fully equipped to perform the said duty, with the exception of the disability imposed upon them by said strike?

THIRTY-FIRST INTERROGATORY: Did the master at any time interfere with or delay the progress of said loading so as to occasion unnecessary delay, and if so, state the causes and the length of time you were so delayed.

THIRTY-SECOND INTERROGATORY: When was the loading completed.

THIRTY-THIRD INTERROGATORY: Were there an holidays included in the period from March 22d to May 15th, and if so, what were they, and on what dates did they occur.

THIRTY-FOURTH INTERROGATORY: Was there any occasion from the time said master gave notice of readiness to receive cargo, until said vessel was completely laden, when the mill failed to supply [89] the ship with sufficient lumber within reach of the vessel's tackle to permit of loading at the normal rate per day.

(Deposition of A. J. Stewart.)

THIRTY-FIFTH INTERROGATORY: Who paid the contracting stevedores for their services as stevedores on said vessel.

THIRTY-SIXTH INTERROGATORY: If either Mr. Renny, Mr. Carter, Mr. Fowle or Mr. Stewart be not present to give their testimony, state, if you know, where he is.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Respondent.

Receipt of a copy of the within Direct Interrogatories is hereby admitted this 17th day of February, 1914.

ANDROS & HENGSTLER,

Proctors for Libelant.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [90]

[Cross-interrogatories to be Administered to A. J. Stewart et al.]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARTIN H. A. ELVERS and FREDERIC A. E. ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

(Deposition of A. J. Stewart.)

CROSS-INTERROGATORIES to be administered to A. J. Stewart, W. P. Fowle, W. C. W. Renny and Henry Carter, witnesses to be produced, sworn and examined on behalf of the respondent in a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States in and for the Northern District of California, Division One, wherein Martin H. A. Elvers and Frederic A. E. Zimmer are libelants, and W. R. Grace & Co., a corporation, is respondent: (All objections to the form, materiality or relevancy of the Direct Interrogatories to said witnesses by respondent are reserved.)

First: If, in answer to the "Fifth" Interrogatory, you have stated the time when you were first notified by the charterer of the selection or nomination of your firm for the loading of the ship "Schwarzenbek," kindly state, in what form the notice was given; if it was given in writing or by wire, attach to this deposition the original notice received by you.

Second: If you were connected with the loading of said vessel at said time, kindly state if you had previously been employed by charterer for the purpose of loading its vessels in Puget Sound, and how often; also state whether you had previously loaded lumber from Millside in other vessels.

Third: Please state where you were on the 13th day of March, 1907; also when you first arrived at Millside, Fraser River. [91]

Fourth: Please describe the geographical location of

(Deposition of A. J. Stewart.)

Millside, Fraser River; state the nature of the place, whether a town, a city, or subdivision of a town; also give its distance from the following places: The mouth of the Fraser River; the city of Vancouver; Royal Roads; Port Townsend; also please state how long it took, with the connections existing during the first half of March, 1907, to travel from any of the places mentioned to Millside.

Fifth: When did the said ship arrive at Millside, Fraser River, and when did she moor at the loading berth alongside the wharf at Millside?

Sixth: Please state, if you know, if there was any stevedore at Millside on the day when said ship arrived; also state on what day the stevedores who loaded the ship arrived at Millside, and what were the names of the foremen or managers in charge of the longshoremen who loaded the ship.

Seventh: If you answer the "Seventh Interrogatory," please explain what you understand by "the rigging of her cargo."

Eighth: If you answer the "Eighth Interrogatory," please state where said conversation took place, and when you first went board the ship.

Ninth: If, in answer to the "Twelfth Interrogatory," you state what the custom or usage is on the Pacific Coast Northern Ports with reference to who shall perform the labor of rigging the vessel to take in lumber, please explain if the same customs or usages apply to deep water lumber carriers as to coastwise vessels.

Tenth: Please specify what labor is necessary in

(Deposition of A. J. Stewart.)

order to rig a vessel to take in lumber, either at side-loading, or at end-loading, and whether this is labor ordinarily performed by stevedores.

Eleventh: Was the ship "Schwarzenbek" loaded over her side, or over her stern, in March, April and May, 1907? [92]

Twelfth: Please state the name of the mill, and the name of the owner thereof, at whose wharf the loading took place.

Thirteenth: If you state in your answers what stevedoring firm loaded the vessel, please state whether it was the same or another firm that rigged the vessel for loading the lumber. Please state also what kind of rigging was actually put up in this case to place the lumber on board; and when the rigging of said vessel for said purpose commenced.

Fourteenth: If you answer the "Eighteenth Interrogatory," kindly explain how you understand the words "ready to receive cargo," in said interrogatory.

Fifteenth: If you answer the "Nineteenth Interrogatory," kindly state whom you understand to be "the contracting stevedores" in said interrogatory; also kindly explain what you understand by the words "want of readiness" in said interrogatory.

Sixteenth: If you answer the "Twentieth Interrogatory," please state what you understand by the words "served upon the mill" in said interrogatory, and state what happened with reference to

(Deposition of A. J. Stewart.)

said exhibit "A" in your own presence, and within your own sight and hearing.

Seventeenth: If you answer the said "Twentieth Interrogatory," please state what other notices passed between the master and the mill, especially prior to said March 21, 1907, and state the terms of such notice to the best of your recollection. Attach all written notices given by the master to you, or to any representative of the mill, with their dates, and have the same identified by the signature of the commissioner.

Eighteenth: When did the master of the ship first ask you, either verbally or in writing, to begin the work of rigging or loading the ship? What did he say to you, as to his ship having waited to be loaded, and what did you answer. [93]

Nineteenth: What was the first day on which the mill had sufficient lumber ready for loading the said ship?

Twentieth: Kindly attach to this deposition all letters and notices which you, either as representative of the stevedores, or as representative of the mill, or in any other capacity, received from the master on any day during March, 1907.

Twenty-first: Kindly state all conversations, requests, orders or communications which passed between representatives of the stevedores and representatives of the mill, in your presence, during March, 1907, with reference to said ship.

Twenty-second: Please state, if you know, whether the same stevedoring firm which loaded said ship,

(Deposition of A. J. Stewart.)

had ever previously loaded deep-water lumber ships at the same wharf?

Twenty-third: Please attach to this deposition any and all letters, communications, notices, and wires which were exchanged between you or your firm or employers, and any other person whatsoever, respecting the loading of the said ship.

Twenty-fourth: Do you affirm under oath that the letters, notices, wires and communications mentioned in your answers to the preceding questions are all the communications which were *exchange* between you or your firm or employers, on the one hand and the charterers, master or stevedores concerned in the loading of the ship, on the other hand?

Twenty-fifth: If you answer the "Twenty-first Interrogatory" in the affirmative, please state the reason given by the master for so interfering.

Twenty-sixth: Please add to the list of holidays which you may have given in answer to the "Thirty-third Interrogatory," a list of the holidays, if any, which occurred between March 2d, and March 22d. [94]

Twenty-seventh: If you answer the "Thirty-fourth Interrogatory," please explain what you understand by "the time said master gave notice of readiness to receive cargo"; also, please state what was "the normal rate per day" referred to in said interrogatory; also please state how you know the quantity of lumber supplied by the mill during the said period.

(Deposition of A. J. Stewart.)

Twenty-eighth: If you answer the "Twenty-fifth Interrogatory," please state the source of your knowledge of the facts.

ANDROS & HENGSTLER,
Proctors for Libelants.

Due service and receipt of a copy of the within Cross-interrogatories is hereby admitted this 19th day of February, 1914.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Respondent.

[Endorsed]: Filed Feb. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [95]

**[Redirect Interrogatories to be Administered to
A. J. Stewart et al.].**

*In the District Court of the United States, in and for
the Northern District of California, Division
One.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

REDIRECT INTERROGATORIES to be administered to A. J. Stewart, W. P. Fowle, W. C. W. Renny and Henry Carter, witnesses to be produced, sworn and examined on behalf of the respondent in

a certain cause of admiralty and maritime jurisdiction now pending in the District Court of the United States in and for the Northern District of California, Division One, wherein Martin H. A. Elvers and Fred-eric A. E. Zimmer are libelants, and W. R. Grace & Co., a corporation, is respondent:

FIRST REDIRECT INTERROGATORY.

A typographical error appearing in the Seventh Direct Interrogatory, which is made the subject of the Seventh Cross-interrogatory, I now ask you to state, if you know, on what date the trimming of the vessel in accordance with the instructions of the Surveyor, and the rigging of the vessel to receive her cargo was completed and concluded.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Respondent.

Receipt of a copy of the within redirect interrogatories is hereby admitted this 20th day of February, 1914.

ANDROS & HENGSTLER,

Proctor for Libelants.

[Endorsed]: Filed Feb. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [96]

(Commission to Notary Public at Victoria, B. C.)

The President of the United States of America, to
Any Notary Public, at Victoria, British Colum-
bia, Canada, Greeting:

KNOW YE, that we, in confidence of your pru-
dence and fidelity, have appointed you commissioner,
and by these presents do give you full power and au-

thority diligently to examine upon corporal oath or affirmation, before you to be taken, and upon the interrogatories, redirect and cross-interrogatories hereunto annexed: A. J. Stewart, W. P. Fowle, W. C. W. Renny, Henry Carter, as witnesses on the part of the respondent in a certain cause now pending undetermined in the District Court of the United States, in and for the Northern District of California, wherein Martin H. A. Elvers and Frederick, A. E. Zimmer are libelants and W. R. Grace & Co., a corporation, is respondent.

And we do hereby require you ~~the said Notary Public~~ before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to the clerk of the District Court of the United States, in and for the Northern District of California, at the city of San Francisco, State of California, as soon as may be convenient after the execution of this commission; and that you return the same, when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

WITNESS, the Honorable M. T. DOOLING, Judge of the District Court of the United States of America, for the Northern District of California, this 20th day of February, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138th.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Opened and Filed as per Stip. June 6, 1914. W. B. Maling, Clerk. C. W. Calbreath, Deputy. Opened and Filed as per Stip. and Order. Mar. 25, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

[Minutes of Hearing—Tuesday, June 9, 1914.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 9th day of June, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 13,980.

MARTIN H. A. ELVERS et al.,

vs.

W. R. GRACE & CO., a Corporation.

This cause this day came on regularly for hearing. Golden Bell, Esq., and Louis T. Hengstler, Esq., appeared on behalf of libelants, and Nathan H. Frank, Esq., and Irving H. Frank, Esq., appeared on behalf of respondent. Mr. Bell and Mr. N. H. Frank stated to the Court their respective views of this cause, Mr. Bell then introduced in evidence certain exhibits which were filed and marked respectively Libelants' Exhibits 1 and 2, and then introduced the depositions of Friedrich Flindt and F. Unruh, which was marked Libelants' Exhibit 3. Mr. Bell then called

Louis T. Hengstler, who was duly sworn and examined on behalf of the libelants, and introduced certain exhibits, which were filed and marked respectively Libelants' Exhibits 4, 5, 6, 7 and 8, and thereupon rested the case of the libelants. Mr. N. H. Frank introduced in evidence the depositions of A. J. Stewart and C. W. Renny and called Edward T. Ford, who was duly sworn and examined on behalf of respondent, and introduced certain exhibits, which were filed and marked respectively Respondent's Exhibits "A," "B," "C," "D" and "E," and thereupon rested the defense of the respondent. On motion of Mr. Bell and consent of Mr. Frank, the [98] Court granted libelants permission to amend the libel filed herein. The Court then ordered cause submitted on briefs, by consent, to be filed. [99]

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Amended Libel for Demurrage.

To the Honorable MAURICE T. DOOLING, Judge
of the United States District Court for the
Northern District of California:

The amended libel of Martin H. A. Elvers and

Frederic A. E. Zimmer against W. R. Grace & Co., the permission of said Court having been obtained to the filing of said amended libel, for a cause of contract, civil and maritime, alleges:

I.

That at all the times herein mentioned libelants were and now are doing business in the city of Hamburg, Empire of Germany, as copartners under the firm name and style of Knohr & Burchard, Nfl., and were and now are the owners of the steel ship called the "Schwarzenbek"; and that, at all of said times, respondent was, and now is, as libelants are informed and believe, a corporation organized and existing under the laws of the State of Connecticut, and doing business in the city of San Francisco, said Northern District of California.

II.

That on or about the 16th day of August, 1906, in the city of London, England, the owners of said steel ship, Messrs, Knohr & Burchard Nfl., libelants herein, by a written charter-party, chartered to respondent the said steel ship, in and by which charter-party the whole of said ship was chartered unto said respondent for a voyage from a mill or loading place on Puget Sound, or in British Columbia not north of Burrard's Inlet, as might be [100] directed by respondent, to Calloa direct; and said respondent engaged by said charter-party to furnish the said vessel for said voyage a full cargo of sawn lumber and/or timber as therein specified. And it was further provided by said charter-party that orders as to loading mill should be given within 48 hours, Sun-

days and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend or Royal Roads, failing which lay days to count. And it was further provided by said charter-party that said respondent should be allowed for the loading of said vessel lay days as follows: Thirty (30) working lay days for loading (not to commence before 1st February, 1907, unless with charterer's consent), to commence twenty-four hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo, master having given written notice to that effect. And it was further agreed by said charter-party that for each and every day's detention by the fault of respondent or agents said respondent should pay to libelants demurrage at the rate of three pence sterling per register ton per day. That a true copy of said charter-party is hereunto annexed, marked exhibit "A," and made a part hereof.

III.

That thereafter, to wit, or or about the 2d day of March, 1907, said ship arrived at Royal Roads and her master on said day gave notice to respondent charterers of her arrival thereat, which notice was received by said respondent charterers at the hour of 4:30 P. M. on the 4th day of March, 1907; that no order or orders whatever as to loading mill were given within 48 hours thereafter; that on the 6th day of March, 1907, at the hour of 5:45 P. M., said respondent charterers, in response to said notice of

said master, wired the master of said ship as follows:—"We will load your ship [101] millside," which wire was thereafter received by said master; that said wire of said respondent charterers did not designate or direct to which millside said vessel should proceed, nor at what time said vessel should proceed thereto; that thereafter said master wired said respondent charterers a second time, and thereafter, and on March 7, 1907, received the following wire from said respondent charterers, to wit, "Millside Frazer River"; that said ship thereafter proceeded to and was at said designated loading place, with her inward cargo and/or unnecessary ballast completely discharged, and was ready to receive her cargo under said charter-party; and her master gave written notice of said facts and said readiness on the 13th day of March, 1907; and that the lay days for the loading of the cargo of said ship, pursuant to the terms of said charter-party, should have begun on the 7th day of March, 1907, and should have ended on the 12th day of April, 1907.

IV.

That notwithstanding said libelants have performed all the conditions of said contract of charter-party, and said ship was ready to receive her cargo, and respondent had notice of the arrival of said ship and 24 hours' notice thereof, pursuant to the terms of said charter-party, and said ship then and there remained at the direction and disposal of said respondent, and notwithstanding there was no remissness nor fault on the part of said libelants, yet the said respondent, by its own default, did not load

the said ship within the thirty working lay days in said charter-party agreed upon, but, contrary to the terms of said charter-party, said respondent delayed said ship until the 15th day of May, 1907, thereafter.

V.

That libelants, by the acts and defaults of respondent as *afore* became entitled to demand from respondent demurrage for thirty-three (33) days at the rate of 3d per registered ton per day, [102] amounting to the sum of Three Thousand Seven Hundred and Sixty-two 91-100 Dollars (\$3,762.91), over and above all just deductions.

VI.

That on or about the said 15th day of May, 1907, the master of said ship, on the demand of charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter-party as aforesaid by duly made protest, issued bills of lading to said charterers, to wit, respondent, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which said bills of lading contained no reference to the demurrage previously incurred. That said bills of lading are in the possession or under the control of respondent, and out of the possession and control of these libelants, and that libelants pray for the production, by respondent, of the original bill of lading for greater certainty in the premises.

VII.

That notwithstanding respondent has been requested to pay the said sum of \$3,762.91, the demurrage aforesaid, respondent has refused and still re-

fuses to pay the same or any part thereof.

VIII.

The copy of the charter-party annexed to the original libel is hereby expressly referred to and made a part hereof as exhibit "A."

IX.

That all and singular the premise are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelants pray that a monition or citation, according to the practice of this Honorable Court in Admiralty and maritime cases, may issue against the said respondent, and that it be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment [103] of the demurrage aforesaid with costs, and that the libelants may have such other and further relief in the premises as in law and justice they are entitled to receive.

ANDROS & HENGSTLER,

Proctors for Libelants.

Northern District of California,—ss.

Louis T. Hengstler, after being duly sworn, deposes: I am the proctor for libelants. Libelants in this cause are absent from this District, to wit, in Hamburg, Germany. That the source of deponent's knowledge is the documents and information derived from libelants, the admissions of respondent, the evidence admitted at the trial of said cause, and that deponent verily believes the facts in this amended libel stated to be true.

LOUIS T. HENGSTLER.

Subscribed and sworn to before me this 10th day of June, 1914.

[Seal]

LEORA HAIL,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within Amended Libel is hereby admitted this 11th day of June, 1914.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Respondent.

[Endorsed]: Filed Jun. 11, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [104]

In the District Court of the United States, in and for the Northern District of California, Division One.

No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E. ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Exceptions to Amended Libel for Demurrage.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States in and for the Northern District of California, Division One:

The Exceptions of W. R. Grace & Co., a Corporation, to the amended libel of Martin H. A. Elvers and

Frederic A. E. Zimmer vs. W. R. Grace & Co., a Corporation, in a cause of contract, civil and maritime, alleged:

I

That the charter-party provides that the bills of lading should be signed "without prejudice to this charter-party," and that said vessel should have a lien on the cargo for demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions of demurrage or otherwise to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose

That by reason of the foregoing, the said amended libel does not state a cause of action against these respondents.

II.

That it is not alleged in said Amended Libel that the said alleged failure to load the vessel within the time in said charter-party provided, was occasioned by the fault of the said respondents [105] or their agents.

WHEREFORE, these respondents pray that said amended libel may be dismissed, and for their costs herein.

NATHAN H. FRANK,
IRVING H. FRANK,

Proctors for Respondents.

Receipt of a copy of the within exceptions to

amended libel is hereby admitted this 1st day of July, 1914.

ANDROS & HENGSTLER,
Proctor for Libelants.

[Endorsed]: Filed Jul. 1, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [106]

*In the District Court of the United States, in and for
the Northern District of California, Division
One.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Notice of Motion to Strike Exceptions from Record.

To W. R. Grace & Co., a Corporation, Respondent
Herein, and to Nathan H. Frank, Esq., and
Irving H. Frank, Esq., Its Proctors:

You and each of you will please take notice that on Tuesday, the 7th day of July, 1914, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom of the above court, Postoffice Building, Seventh and Mission Streets, city and county of San Francisco, State of California, proctors for libelants herein will move the above court to strike from the files and records in the above-entitled cause, the exceptions of respondent to

the amended libel on file herein; that said motion will be made upon the following grounds, to wit:

1. That said exceptions to the amended libel are in the identical language of the exceptions to the original libel herein on file, and present precisely the same issues of the law as were presented by the exceptions to the original libel. That the new matter added by the amended libel to the matter contained in the original libel in no manner changed the effect of the original libel in any of the particulars to which the exceptions to the amended libel are directed; that the exceptions to the original libel, after due consideration by the Honorable John J. DeHaven, when Judge of this Honorable Court, upon elaborate briefs submitted [107] by both libelants and respondents, overruled said exceptions to the original libel, and respondent thereafter answered the said libel.

2. That the present exceptions of respondent represent an attempt to have the same questions heretofore passed upon by this Honorable Court again considered, after said cause has been tried, and after libelants have filed their opening brief upon the merits; that said exceptions are wholly frivolous, and interposed for the purpose of further delaying the decision of said cause upon its merits, and unnecessarily represent matters to this Court which it has heretofore considered and passed upon.

WHEREFORE libelants pray that said exceptions to said amended libel be stricken from the files and records herein.

Dated July 2, 1914.

ANDROS & HENGSTLER,
GOLDEN W. BELL,

Proctors for Libelants.

Receipt of a copy of the within Notice of Motion is hereby admitted this 2d day of July, 1914.

NATHAN H. FRANK,
IRVING H. FRANK,

Proctors for Respondent.

[Endorsed]: Filed Jul. 2, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [108]

[Order Denying Motion to Dismiss Exceptions to Amended Libel and Denying Motion Overruling Exceptions Thereto, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 11th day of July, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 13,980.

MARTIN H. A. ELVERS et al.

vs.

W. R. GRACE & CO.

The motion to dismiss respondent's exceptions to the amended libel this day came on regularly for hearing. Louis T. Hengstler, Esq., appeared on be-

half of libelants, and in support thereto, and Irving H. Frank, Esq., appeared on behalf of respondents and in opposition to said motion. After hearing proctors for both parties, the Court ordered that said motion be, and the same is hereby, denied. Mr. Hengstler then made a motion overruling the exceptions to said amended libel, which was likewise denied by the Court. Further ordered that the claimant file its brief on or before August 11th, 1914. [109]

*In the District Court of the United States in and for
the Northern District of California, Division
One.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Answer to Amended Libel.

To the Honorable the District Court of the United States in and for the Northern District of California:

The answer of W. R. Grace & Co., a Corporation, to the amended libel of Martin H. A. Elvers and Frederic A. E. Zimmer, for a cause of contract, civil and maritime, alleges:

I.

Answering unto article I of said amended libel,

and particularly unto the allegation therein that the said libelants were, and are, doing business in the city of Hamburg, in the Empire of Germany, as co-partners under the firm name and style of Knohr & Burchard, Nfl., and were, and are, the owners of the steel ship called the "Schwarzenbek," this respondent is ignorant, so that it can neither admit nor deny the same, wherefore it calls for proof thereof.

II.

Answering unto article III in said amended libel, this respondent admits that on the 4th day of March, 1907, the master of said vessel wired the said respondent as follows: " 'Schwarzenbek' arrived wire instructions," which said telegram was received by said respondent at 4:30 P. M.; that on the 6th day of March following, at 5:45 P. M., the said respondent wired the said master as [110] follows: "We will load your ship at Millside." That thereafter to wit, on March 8th, 3:55 P. M., the said respondent received a further telegram from said master, as follows: "Want definite instructions when to proceed to Millside"; to which said respondent replied on said date, at 4:40 P. M. "Proceed to Millside as soon as you are ready." Said respondent denies that on the 2d day of March, the said master gave notice to the respondent of the arrival of said vessel at Royal Roads; and further denies that the respondent charterer in response to any notice of arrival from said master wired the said master of said ship otherwise than as hereinbefore admitted, or that thereafter said master wired said respondent charterer the second time otherwise than as hereinbefore

admitted; and further denies that on the 7th day of March, 1907, the said master received any telegram from said charterers otherwise than as hereinbefore admitted; and said respondent further denies that on the 13th day of March, 1907, said ship was at said designated loading place with her inward cargo and/or unnecessary ballast completely discharged, or was ready to receive her cargo under said charter-party, or that her master then gave written notice of said facts or of said readiness; and further denies that the lay days for the loading of the cargo of said ship pursuant to the terms of said charter-party should have begun on the 7th day of March, 1907, or at any day before the 22d day of March, 1907, or should have ended on the 12th day of April, 1907, or on any day before the 17th day of May, 1907.

III.

Answering unto article IV of said amended libel, this respondent denies that said libelants have performed all of the conditions in said charter-party; and further denies that said ship was ready to receive her cargo, or that respondent had notice of the arrival of the ship, or had 24 hours notice thereof pursuant [111] to the terms of said charter-party, or that said ship then or there remained at the direction or disposal of said respondent otherwise than as hereinbefore admitted. Said respondent further denies that there was no remisness or fault on the part of said libelants; and further denies that said respondent by its own default, or otherwise, or at all, did not load said ship within the 30 working lay days in said charter-party agreed upon; and

further denies that contrary to the terms of said charter-party, or otherwise, or at all, said respondent delayed said ship until the 15th day of May, 1907, thereafter, or otherwise or at all delayed said vessel contrary to the terms of said charter-party.

Said respondent alleges that on the 1st day of April, 1907, the master of said vessel, of his own motion, and without cause, did stop, cease and discontinue the further loading of said vessel, and refused to accept any delivery of cargo, and continued to so refuse up to and until the forenoon of the 3d day of April, 1907, whereby three days were lost to said respondent in the loading of said vessel.

Respondent further alleges that March 29th and April 1st, were respectively holidays at said loading port, and were not working lay days for said loading; and further alleges that on the 23d day of April, 1907, the stevedores' crew engaged in the loading of said ship combined in a strike and ceased work, and did coerce and threatened other workmen assisting in the loading of said vessel, and that said strike continued until the 11th day of May, 1907, on which day said stevedores' crew again commenced to work and completed the loading of said work on the 15th day of May, 1907.

That under the terms of said charter-party, the said lay days would have expired on the 17th day of May, 1907, and not otherwise. [112]

IV.

Answering unto article V of said amended libel, this respondent denies that by the acts or defaults of respondent, or otherwise, or at all, the said libel-

ants became entitled to demand from the said respondent demurrage for 33 days at the rate of 3d. per register ton per day, or at any rate whatsoever, amounting to the sum of Three Thousand Seven Hundred and Sixty-two and $91/100$ (3,762.91) Dollars, over and above all just deductions, or that they became entitled to demand demurrage for any other time or sum whatsoever, or at all.

V.

Answering unto article VII of said amended libel, this respondent denies that it has been requested to pay the said sum of Three Thousand Seven Hundred and Sixty-two and $91/100$ (3,762.91) Dollars, the demurrage aforesaid, but admits that it has been requested to pay the sum of Two Thousand Nine Hundred and Seventy-four and $72/100$ (2,974.72) Dollars.

VI.

Answering unto article IX of said amended libel, this respondent denies that all or singular the premises in said amended libel alleged are true, but admits that the same are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, respondent prays that said amended libel may be dismissed, and for its costs herein, and for such other and further relief as in law and justice it may be entitled to.

NATHAN H. FRANK,

Proctor for Respondent. [113]

State of California,

City and County of San Francisco,—ss.

Edward T. Ford, being duly sworn, deposes and

says: That he is an officer of W. R. Grace & Co., a Corporation, Respondent in the above-entitled cause, to wit, the sub-manager thereof; that he has read the foregoing answer to amended libel, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

EDWARD T. FORD.

Subscribed and sworn to before me this 31st day of August, 1914.

[Seal]

GEO. H. PROBASCO,

Notary Public in and for the said City and County of San Francisco, State of California.

Receipt of a copy of the within Answer to Amended Libel is hereby admitted this 31st day of August, 1914.

ANDROS & HENGSTLER,

Proctor for Libellant.

[Endorsed]: Filed Aug. 31, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [114]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Monday, the 17th day of May, in the year of our lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, Judge.

No. 13,980.

MARTIN H. A. ELVERS et al.,
vs.

W. R. GRACE & CO., a Corp.

(Order Sustaining Exceptions to Amended Libel.)

In this cause the Court ordered that the exceptions to the amended libel heretofore filed and submitted herein, be, and the same are hereby sustained. [115]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corp.

Respondents.

(Opinion and Order Sustaining Exceptions to Amended Libel.)

ANDROS & HENGSTLER and G. W. BELL,
Esq., Proctors for Libelants.

NATHAN H. FRANK, Esq., and IRVING H.
FRANK, Esq., Proctors for Respondents.

This is an action on the part of the shipowners against the charterers for demurrage at the port of loading.

The charter contains the following provisions:

“For each and every days detention by the fault of party of the second part (charterers) or agents, they agree to pay to said party of the first part, demurrage at the rate of three pence sterling per register ton per day.”

“Bills of lading to be signed for pieces with the clause ‘All on board to be delivered,’ and at any rate of freight shippers may desire without prejudice to this charter; but if at a lower rate than provided in charter, difference to be paid in cash at port of loading, less commission, interest and insurance.”

“Vessel to have a lien on cargo, for all freight, dead freight and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage, or otherwise, to be settled with the consignees, the Owners and Captain looking to their lien on the cargo for this purpose.”

The provision for the payment of demurrage by the charterers applied [116] alike to delays in loading and delays in discharging.

As the libel is against the charterers *in personam*, exceptions have been filed to it, on the ground that it states no cause of action against respondents, the charterers, because of the cesser clause in the charter, but that libelants’ only remedy is an action *in rem* against the cargo. The action was, however, fully tried, and these exceptions are taken to an

amended libel filed at or about the close of the trial. Similar exceptions taken to the original libel were overruled by the former Judge of this court. The high regard which I have for the late Judge De Haven's learning has caused me to hesitate long before deciding that the exceptions to the amended libel are well taken. But a careful study of the English and American cases in which the effect of so-called "cesser clauses" has been passed upon has led me to the conclusion that under the provisions of this charter the cesser clause is effective. In the first place there is nothing in the nature of the subject matter which would prevent the parties from entering into any agreement satisfactory to themselves concerning the question of demurrage. The charter-party might well have provided that no demurrage at all should be charged for delay, or it might provide as here that demurrage should be paid, but that after the ship was laden the owner should be given a lien upon the cargo, and should look to it for the purpose of securing such payment, and that "all and any liability of the charterers under the charter shall cease and determine as soon as the cargo is on board." If there be nothing in the charter itself which renders it impossible or even difficult for the ship to secure and enforce the lien upon the cargo which the charter gives, and such lien would be commensurate with the liability of the charterers for demurrage, there is no reason why an Admiralty Court should not hold the parties to the contract which they have made. There does not seem to me to be any [117] question of public

policy involved which would prevent the enforcement of the contract as it is written, or permit its enforcement otherwise than as written. It is, after all, only the construction of the whole charter that is here involved. An early clause in the charter provides for the payment by charterers of demurrage for delays through their fault either in loading or discharging the vessel beyond the lay days allowed for such purpose. A later clause declares "vessel to have a lien on cargo for all freight, dead freight and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and Captain looking to their lien on the cargo for this purpose." Is the lien here created commensurate with the liability of the charterers provided for in the antecedent clause? I cannot escape the belief that it is so commensurate with the charterers' liability, unless there be some other provisions of the charter which permits the charterers to destroy or render valueless the lien so created. I find no such provision.

In *Clink vs. Radford*, 1 Q. B. 625, it was said by one of the Judges:

"In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the Court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in

respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract.”

Another one said: [118]

“There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer’s liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility, which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability.”

And the third added:

“The rule that we are *prima facie* to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is

simply this, that the two are to be read, if possible, as coextensive. If that were not so, we should have this extraordinary result: there would be a clause in the charter-party the breach of which would create a legal liability, there would then be a cesser clause destroying that liability, and there would then come a lien clause which did not recreate that liability in anybody else."

And in a later case *Hansen vs. Harrold*, 1 Q. B. 617, speaking of the foregoing, it is said:

"It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true, that where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter-party the charterers are able to create, is not equivalent to the liability of the characters. Where, [119] in such a case, the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability.

The Supreme Court in *Crossman vs. Burrill*, 179 U. S. 100, quoting the foregoing laid down the following as the true rule: "In short, in a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creat-

ing a lien in favor of the shipowner, the cesser clause is to be construed if possible, as inapplicable to a liability with which the lien is not commensurate." The Court held the clause of the charter there under consideration to be ineffective because the lien created by the charter was not commensurate with the charterer's liability. But in that case the charter contained also the further provision "bills of lading to be signed as presented, without "prejudice to this charter," and as the bills of lading as presented contained no reference to the payment of demurrage, nor any reference to the terms of the charter other than those concerning freight and average, the Court held that the indorsees of the bills of lading were not bound by the charter provisions giving the vessel a lien upon the cargo for demurrage, and that the rights of the shipowners against the indorsees depended altogether upon the contract created by the bills of lading, except so far as that contract referred to the charter-party. It seems to me that the provision "bills of lading to be signed *as presented*" and the presentation of such bills containing no provision for the payment of demurrage made a case such as is mentioned in *Hansen vs. Harrold, supra*, "Where, in such case, the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not [120] commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability."

In the case at bar, however, there is no provision in the charter-party which would enable the charterers to make such terms with the shippers, or with the owners as would render the lien created by the charter at all uncommensurate with the charterers' liability for demurrage, either at the port of loading or at the port of discharge.

There is nothing in this charter-party which would prevent the master from preserving in the bill of lading the lien given by the charter for "all freight, dead freight and demurrage." The fact that he did not do so seems to me to be a false quantity, tending only to confuse the real question, which is the construction of the charter-party itself. For otherwise, even if it were conceded that this charter-party does absolve the charterers from the payment of demurrage, the master could defeat this absolution by failing to preserve the lien in the bill of lading. But the charter-party is an instrument complete in itself and when the parties thereto enter into certain agreements, it should not be in the power of the master to render any of those agreements abortive through the medium of a bill of lading. If the charter-party itself and within its own four corners has the effect of rendering the lien created by it uncommensurate with the liability of the charterers under a stipulation for demurrage then a cesser clause in such charter-party will not absolve the charterers from such liability. But if the charter-party itself gives a lien commensurate with the charterers' liability the cesser clause will be given the full effect which its terms require. And this seems to me to be

the only conclusion to be drawn from the adjudicated cases both [121] English and American. Many of these cases give to the cesser clause full efficiency as absolving the charterers from all liability whether incurred at the port of loading or at the port of discharge. Others make this clause only effective as to liabilities accruing at the port of discharge, holding the charterers responsible for all liability incurred before the cargo is fully on board. Still others give no effect whatever to the cesser clause for the reason that the Court finds that the lien given by the charter is not commensurate with the liability of the charterers also created thereby. But in all the cases these various conclusions result from the consideration and construction of particular charter-parties, according to the terms used in creating the liability, in providing for its cessation, and in creating the lien in lieu thereof.

It is a vexed and perplexing question, but taking all the terms of the charter-party under consideration here, I am of the opinion that the reasonable construction requires that effect be given to the cesser clause, and that the remedy of the libelants is not under the charter by "action against the charterers at all on the charter, after the ship is fully loaded, but that they are to have as a remedy for their freight, dead freight and demurrage, nothing but a lien on the cargo." *Sanguinetti vs. Pacific Steam Navigation Co.*, L. R. 2 Q. B. D. 238.

The exceptions to the amended libel are therefore sustained. May 17th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 17, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [122]

In the District Court of the United States, in and for the Northern District of California, Division One.

At a stated term of the District Court of the United States in and for the Northern District of California, held at the courtroom thereof, in the Postoffice Building at said City and County of San Francisco, State of California, on Thursday, the third day of June, 1915. Present: Hon. MAURICE T. DOOLING, District Judge.

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E. ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Final Decree.

The above-entitled cause having come on for hearing, and the said cause having been tried upon its merits, the said libelants applied for leave to file an amended libel to conform to the proofs, and said application having been granted, thereupon the said libelants filed and amended libel, to which the said respondent excepted, upon the grounds, among others, that said amended libel did not state facts sufficient to constitute a cause of action against this

respondent; and said exceptions having been argued and submitted by the proctors for the respective parties, and due deliberation being had in the premises;

It is now ORDERED, ADJUDGED AND DECREED that said exceptions be, and the same are, hereby sustained, and the said amended libel be, and the same hereby is dismissed with costs to the respondent herein.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jun. 3, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [123]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E. ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Decree Dismissing Cross Libelant's Libel.

The exceptions of respondent to the original libel having been sustained and the original libel having been heretofore dismissed,

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the cross-libel be, and it is hereby, dismissed.

Done in open court this 14th day of June, 1915.

M. T. DOOLING,
Judge of said Court.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [124]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Notice of Appeal.

To W. R. Grace & Co., a Corporation, Respondent
in the Above-entitled cause, and to Messrs.
Nathan H. Frank and Irving H. Frank, Its
Proctors and to W. B. Maling, Clerk of the
United States District Court for the Northern
District of California, First Division:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE that the libelants in the above-
entitled cause hereby appeal to the United States
Circuit Court of Appeals for the Ninth Circuit from
the final decree of the District Court of the United
States for the Northern District of California, sit-
ting in admiralty, entered in said cause on the 3d day
of June, 1915.

DATED October 13, 1915.

LOUIS T. HENGSTLER,
GOLDEN W. BELL,

Proctors for Libelants.

Receipt of a copy of the within notice of appeal is hereby admitted this 13th day of October, 1915.

NATHAN H. FRANK,
IRVING H. FRANK,

Proctors for Respondent.

[Endorsed]: Filed Oct. 13, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [125]

*In the District Court of the United States for the
Northern District of California, First Division,*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants and Appellants,
vs.

W. R. GRACE & CO., a Corporation,
Respondent and Appellee.

Assignment of Errors.

Come now the libelants and assign as error committed by the District Court of the United States, in the proceedings, the order and the decree dismissing the amended libel, the following:

1. The District Court erred in sustaining and in not overruling the exceptions to the amended libel.
2. The District Court erred in concluding, holding and deciding that the amended libel does not state

a cause of action against said respondent, and in not concluding, holding and deciding that said amended libel does state a cause of action against respondent.

3. The District Court erred in concluding, holding and deciding that because of the "cesser clause" contained in the charter-party upon which the amended libel is founded, the libelants' only remedy was or is an action in rem against the cargo of the chartered vessel "Schwarzenbek"; and in concluding, holding and deciding that, because of said "cesser clause," libelants have no remedy in personam against respondent. [126]

4. The District Court erred in concluding, holding and deciding that the libelants had or have, as a remedy for their damage resulting from the detention of their vessel, nothing but a lien on the cargo of the chartered vessel.

5. The District Court erred in concluding, holding and deciding that libelants had or have no action against respondent as charterer, on the charter-party, and in not concluding, holding and deciding that libelants had and have such an action against respondent.

6. The District Court erred in concluding, holding and deciding that the libelants had or have no action against the respondent as consignee of the cargo of the chartered vessel or as the indorsee of the bills of lading for said cargo, and in not concluding, holding and deciding that libelants had and have such an action against respondent.

7. The District Court erred in concluding, hold-

ing and deciding that a lien was given or created by the cesser or other clause in the charter-party, or in any manner whatsoever, upon the cargo of said vessel, for liability incurred by the detention of the vessel, and in not concluding, holding and deciding that no lien ever arose or was created therefor.

8. The District Court erred in concluding, holding and deciding that libelants had a lien upon the cargo of said vessel which was or is commensurate with the liability of the respondent under the charter-party or otherwise, and in not holding and deciding that if any lien upon said cargo was or is given by the charter-party, or otherwise, such lien was and is not commensurate with the liability of respondent.

9. The District Court erred in concluding, holding and deciding that the bills of lading issued for the cargo of said vessel did not prejudice the charter-party and libelant's right [127] to demurrage or damages, and in not holding that the bills of lading did prejudice the charter-party and libelants' said rights.

10. The District Court erred in concluding, holding and deciding that the cesser clause in the said charter-party, construed as limiting libelants' remedy to a lien upon the cargo of said vessel, and as depriving them of any remedy in personam against respondent, was and is not invalid and void as contrary to public policy; and in not holding and deciding that said cesser clause, so construed, was and is invalid and void as contrary to public policy.

11. The District Court erred in concluding, deciding and holding that the cesser clause in the

charter-party was or is effective, and in not concluding and holding that it was and is ineffective.

12. The District Court erred in the construction placed by it upon the cesser clause in the charter-party.

13. The District Court erred in not concluding, holding and deciding that all of the allegations contained in the amended libel were and are true.

14. The District Court erred in not concluding, holding and deciding that the libelants were and are entitled to recover from the respondent demurrage or damages for thirty-three (33) days, at the rate of three (3) pence sterling per registered ton per day, or \$3,762.91, and in not rendering and entering a decree in favor of libelants for that amount, together with interest thereon from the 15th day of May, 1907, and libelants' costs of suit.

15. If the District Court did not err in not concluding, holding and deciding that the libelants were and are entitled to recover from the respondent demurrage or damages for thirty-three (33) days, and in not rendering and entering a decree therefor, as aforesaid, said Court erred in not concluding, holding and deciding that libelants were and are entitled to recover from the respondent [128] demurrage or damages for twenty-six (26) days at the rate of three (3) pence sterling per registered ton per day, or \$2,964.72, and in not rendering and entering a decree in favor of libelants for that amount, together with interest thereon from the 15th day of May, 1907, and libelants' costs of suit.

16. The District Court erred in not concluding,

holding and deciding that libelants performed all of the terms and conditions of the charter-party on their behalf to be performed, fully and in every respect.

17. The District Court erred in not concluding, holding and deciding that, under the charter-party, lay days began with and including the seventh (7th) day of March, 1907, and ended with the twelfth (12th) day of April, 1907.

18. If the District Court did not err in not concluding, holding and deciding that, under the charter-party, lay days began with and including the seventh (7th) day of March, 1907, and ended with the twelfth (12th) day of April, 1907, said Court erred in not concluding, holding and deciding that, under the charter-party, lay days began with and including the fourteenth (14th) day of March, 1907, and ended with the nineteenth (19th) day of April, 1907.

19. The District Court erred in not concluding, holding and deciding that the days of detention by default of respondent began to run against respondent with and including the thirteenth (13th) day of April, 1907, and continued to run to and including the fifteenth (15th) day of May, 1907.

20. If the District Court did not err in concluding, holding and deciding that the days of detention by default of respondent began to run against respondent with and including the thirteenth (13th) day of April, 1907, and continued to run to and including the fifteenth (15th) day of May, 1907, said court erred in not concluding, holding and deciding that said days of detention began to run against re-

spondent with and including the twentieth (20th) day of April, 1907, [129] and continued to run to and including the fifteenth (15th) day of May, 1907.

21. The District Court erred in not concluding, holding and deciding that the respondent, wholly by and because of the fault of respondent and its agents, and without any fault upon the part of libelants or their agents, wrongfully used and detained said vessel, contrary to the terms of said charter-party, for a period from and including the thirteenth (13th) day of April, 1907, to and including the fifteenth (15th) day of May, 1907.

22. If the District Court did not err in not concluding, holding and deciding that the respondent, wholly by and because of the fault of respondent and its agents, and without any fault upon the part of libelants or their agents, wrongfully used and detained said vessel, contrary to the terms of the charter-party, for a period from and including the thirteenth (13th) day of April, 1907, to and including the fifteenth (15th) day of May, 1907, said Court erred in not concluding, holding and deciding that the respondent, wholly by and because of the fault of respondent and its agents, and without any fault upon the part of libelants or their agents, wrongfully used and detained said vessel, contrary to the terms of the charter-party, for a period from and including the twentieth (20th) day of April, 1907, to and including the fifteenth (15th) day of May, 1907.

23. The District Court erred in not concluding, holding and deciding that the master of said vessel at no time stopped, ceased or discontinued the load-

ing of said vessel of his own motion or without cause; and that said master at no time of his own volition or without cause refused to accept delivery of cargo thereon; and that any and all suspensions in the loading of said vessel were wholly due to the fault of respondent and its agents, and not to any fault upon the part of libelants or their agents.

24. The District Court erred in not concluding, holding and deciding that on or about the fifteenth (15th) day of May, 1907, the [130] master of said vessel, on the demand of respondent, but reserving all of the rights and claims of libelants, on account of the respondent's breach of the charter-party in the respects enumerated in the amended libel herein, by duly made protest, issued bills of lading to said respondent, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which bills of lading contained no reference to the detention or demurrage previously incurred; and that said bills of lading are in the possession and under the control of respondent and out of the possession and control of libelants, and were not produced by respondent at the trial, although demand was made in said amended libel, and in the original libel, for the production thereof at the trial.

25. The District Court erred in not concluding, holding and deciding that any delay due to the alleged strike, referred to in respondent's answer was, and is, wholly immaterial in that it occurred, if at all, after the lay days allowed to respondent for loading had expired.

26. The District Court erred in not awarding and

decreeing to libelants the relief prayed for in said amended libel.

Dated: San Francisco, California, February 23, 1916.

ANDROS & HENGSTLER,
GOLDEN W. BELL,

Proctors for Libelants and Appellants.

[Endorsed]: Receipt of a copy of the within assignment of errors is hereby admitted this 23d day of February, 1916, reserving all rights.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Respondent.

Filed Feb. 23, 1916. W. B. Maling, Clerk. By
T. L. Baldwin, Deputy Clerk. [131]

(Libelants' Exhibit "2.")

W. R. GRACE & CO.,
New York, San Francisco,
Lima, Callao, Valparaiso,
Santiago, Concepcion.

GRACE BROS. & CO., LIMITED,

London Agents.

LUMBER

1 THIS CHARTER PARTY, made and concluded upon in the City of London this 16th day of August, one thousand nine hundred and Six, BETWEEN MESSRS. KNOHR & BURCHARD NFL., for and on behalf of the owners of the Steel ship called the "SCHWARZENBEK," of the burden of 1877 tons or thereabouts, register measurement, now on passage to Santa Rosalia,

Lawther,
Latta
& Co.,
London.

of the first part, and Messrs. W. R. GRACE & CO. San Francisco of the second part,

10 WITNESSETH, that the said party of the first part, in consideration of the covenants and agreements hereinafter mentioned, to be kept, and performed by the said party of the second part, does covenant and agree on the freighting and chartering of the whole of the said vessel unto the said party of the second part, for a voyage from a Mill or loading place on PUGET SOUND, or in British Columbia not north of Burrard's Inlet, as may be directed by Charterers, to

Howard
Houlder
& Partners,
Ltd.,
Ship
Brokers,
London,

Also at
Glasgow,
Liverpool,
Cardiff,
Barry Port,
Talbot,
Greenock,
and
New York.

Callao direct

or to a direct port within said range, at *Charters'* option, orders to be given on signing Bills of Lading. Charterers to have the privilege of loading vessel at two Mills, but same must be in the same country, they paying the extra cost of towage, if any, and time used in so moving to count as lay days.

20 The said vessel shall be kept tight, staunch, strong and every way fitted for such a voyage, and receive on board for the aforesaid voyage, the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from said parties of the second part, or their agents.

23 The said party of the second part do engage to furnish the said vessel for the voyage aforesaid, a full cargo of SAWN LUM-

BER and/or TIMBER of such lengths and sizes as can be taken through vessel's hatchways (and bow and stern ports, if any). Lengths not shorter than sixteen feet, except at Charterer's option. No lumber to be cut by ship without written authority from the Charterers.

- 26 Vessel to have the privilege of loading a deckload, not endangering safety of the cargo, paying the extra insurance on same. Cargo on deck to consist of the largest sizes of rough lumber unless otherwise directed by Charterers.
- 28 Broken stowage, if required, to be furnished by Charterers, at their option, in lengths not shorter than twelve feet, paying half freight thereon, failing which owners to have the privilege of loading same on ship's account.
- 30 Orders as to loading Mill to be given within forty-eight hours, Sundays and legal Holidays excepted, after notification to Charterers or their Agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend or Royal Roads, failing which lay days to count.
- 32 In case of fire or accident at the Mill where vessel is ordered to load, Charterers to have the privilege of ordering the vessel to another Mill on Puget Sound or in British Columbia, pay the additional towage in-

curred, but lay days not to count during time occupied in moving.

- 34 The said party of the second part agrees to pay to said party of the first part, or Agents, for the charter or freight of said vessel during the voyage aforesaid, in manner following, that is to say:

Fifty Shillings (50)

for each thousand feet, board measure, delivered. If ordered to a direct port of discharge or if cargo be all discharged at port of call, the freight to be two shillings and six pence less per thousand feet.

- 43 Freight payable on the right and full delivery of cargo at final port of discharge, in good and approved Bills of Exchange on London, at 90 days sight, or in cash at current rate of exchange, at Charterer's option.

- 45 If discharge is required at more than one port sufficient cargo is to be left on board to enable the vessel to shift with safety, and vessel is not to be ordered to a port south.

- 52 Said party of the second part shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid, lay days as follows: Thirty (30) working lay days for loading, not to commence before 1st Feby 1907 unless with Charterers consent, to commence twenty-four [132] hours after vessel is at loading place satisfactory to Charterers, inward cargo and/or unnecessary ballast discharged and ready

to receive cargo; Master having given written notice to that effect. Discharge to be given with dispatch according to the custom of the port of discharge at such safe wharf, dock or place as Charterers may direct, but at not less than 35000 feet B. M. per day. For each and every day's detention by the fault of party of the second part or agents, they agree to pay to the said first party of the first part demurrage at the rate of three pence sterling per register ton per day. Should the vessel be detained by the Master beyond the time herein specified, demurrage shall be paid to Charterers at the same rate and in the same manner. Cargo shall be received and delivered within reach of vessel's tackles where she can lie afloat.

60 Three days to be allowed Charterers' Agents for giving discharging orders at Port of Call.

61 Vessel to furnish, within five days after arrival at loading place, as ordered, a certificate from a Marine Surveyor of the San Francisco Board of Underwriters, that she is in proper condition for the voyage, and a further certificate in due course, that she is properly loaded. Should vessel fail to pass satisfactory survey and should she be detained more than ten days for repairs, to enable her to pass such survey, this charter to be void at Charterers' option, such option to be declared at the end of said ten days.

- 67 General Average, if any, as per York-Antwerp rules, 1890.
- 68 Cargo to be stowed under the Master's supervision and direction; Charterers' stevedore to be employed at current rates not exceeding \$1.10.
- 69 Bills of Lading to be signed for pieces with the clause—"All on board to be delivered," and at any rate of freight shippers may desire without prejudice to this Charter; but if at a lower rate than provided in Charter, difference to be paid in cash at port of loading, less commission, interest and insurance.
- 72 (Act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collisions, strandings and other accidents of navigation, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the ship-owner, civil commotions, floods, frosts, storms, fire, strikes, lock-outs and stoppages (partial or otherwise) or accident at the mill, or on railways or docks; or strikes, lock-outs or stoppages (partial or otherwise) or any other hindrances or delays of whatsoever nature connected with the working, delivery or shipment of the cargo or any part thereof beyond the Charterers' or agents' control throughout the

charter always excepted).

- 78 Vessel to have a lien on cargo, for all freight, dead freight and demurrage, it being understood that all and any liability of the Charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the Consignees, the Owners and Captain looking to their lien on the cargo for this purpose.
- 81 Should the vessel be compelled to put into any part or ports, the Master shall consign her to Charterers or their correspondents, paying them the usual commissions.
- 83 A sufficient amount for ship's ordinary disbursements at port of loading, say not exceeding — pounds sterling to be advanced by Charterers, on account of freight under this Charter Party subject to a charge of — per cent, to cover interest, insurance and commission; advance to be endorsed on Captain's copy of Charter Party and all the Bills of Lading.
- 87 A commission of five $3\frac{3}{4}$ per cent, on estimated amount of this Charter is due and payable to Messrs. W. R. Grace & Co. San Francisco on completion of loading, or should vessel be lost. Exchange at \$4.86 per £ sterling.
- 89 Vessel to be consigned to Charterers' agents at port of discharge inwards only,

paying them a commission of two and one-half per cent, on amount of freight under this Charter and usual agency not exceeding five guineas for transacting vessel's inward business. At Charterers' option the above commission of seven six and one half quarter per cent, is payable at port of lading. [133]

92 Vessel to be consigned outward to Charterers' agents on Puget Sound or in British Columbia, and inwards if in ballast, free of commission, paying them the usual fee for doing Custom House business, not to exceed twenty-five dollars. Vessel to clear at the Custom House in the name of Charterers.

94 In case the vessel does not arrive at Port of Call, or Mill as ordered by Charterers, on or before sundown of 31st March, 1907 the Charterers are to have the option of cancelling or maintaining this Charter; said option to be declared within forty-eight hours after arrival of vessel at Port of Call or Mill as above.

97 To the true and faithful performance of all the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators and assigns, and also the said vessel, freight, tackle and appurtenances and the merchandise to be laden

on board, each to the other, in the penal sum of amount of Charter.

IN WITNESS WHEREOF, we hereunto set our hands, the day and year first above written.

Signed in the Presence of Darsena Dueson, cargo at Callao to be paid by Receivers there.

Signed in the presence of

Messrs. W. R. GRACE & CO.,

San Francisco,

By authority of owners,

HOWARD HOULDER & PARTNERS, LTD.

(S) HOWARD HOULDER,

Director,

As Agents.

GRACE BROS. & CO., LTD.

(S) J. P. EYRE,

Managing Director,

As Agents, 16-8-06. [134]

(Libelants' Exhibit "3.")

U. S. Consulate General,

Oct. 19, 1910.

Hamburg, Germany.

**(Commission to Consul-General, at Hamburg,
Germany.)**

The President of the United States of America, to the Consul-General of the United States, at Hamburg, Germany, or Any Person Acting for or Designated by him:—Greeting:

KNOW YE, That we, in confidence of your prudence and fidelity, have appointed you Commis-

sioner, and by these presents do give you, and each of you, full power and authority diligently to examine upon their corporal oath or affirmation, before you to be taken, and upon the interrogatories hereunto annexed, FRIEDRICH FLINDT and F. UNRUH, as witnesses on the part of the libelant in a certain cause now pending undetermined in the District Court of the United States, in and for the Northern District of California, wherein MARTIN H. A. ELVERS and FREDERIC A. E. ZIMMER, are libelants, and W. R. Grace & Co., a corporation, is respondent.

And we do hereby require you, or either of you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to Jas. P. Brown, Clerk of the District Court of the United States, in and for the Northern District of California, at the City of San Francisco, State of California, as soon as may be convenient after the execution of this commission; and that you return the same, when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

WITNESS, the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States of America, for the Northern District of California, this fourth day of October, in the year of our Lord one thousand nine hundred and ten and of our independence the one hundred and 35th.

[Seal]

JAS. P. BROWN,

Clerk.

By M. T. Scott,

Deputy Clerk. [135]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Stipulation for Taking of Testimony (of Friederich
Flindt et al.).**

It is hereby stipulated by and between the parties hereto that the testimony of Friederich Flindt and F. Unruh may be taken upon oath at the City of Hamburg, Germany, before the Consul-General of the United States in said city, or any person acting for or designated by him when the depositions of said witnesses may be taken under this stipulation, without the issuance of a commission therefor, upon this stipulation, and upon the direct interrogatories served this date, and upon cross-interrogatories to be served within 20 days from this date; and that thereafter said depositions may be taken forthwith, and when taken, returned to the clerk of said court. When taken and returned, said depositions may be offered and read in evidence, subject to any and all objections thereto, except as to the method of taking said depositions.

Dated September 7th, 1910.

ANDROS & HENGSTLER,
Proctors for Libelants.
NATHAN H. FRANK,
Proctor for Respondent.

[Endorsed]: Filed Sep. 10, 1910. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [136]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Interrogatories to be Propounded to Friederich
Flindt, at Hamburg, Germany, on Libelants'
Behalf.**

1. What is your full name, age and occupation?
2. What was your occupation during the months of March, April and May, 1907?
3. If your answer to the preceding question is, that you were then the master of the German ship "Schwarzenbek," state who were then the owners of said ship, who were her charterers and where was said ship on March 4, 1907.
4. State what loading mill was designated by charterers after arrival of your ship at Royal Roads, Puget Sound, and when.

5. State generally what occurred between you, the mill and the charterer, relative to loading your ship, after your arrival at Royal Roads.
6. On what day did your ship arrive at the designated loading place?
7. If your answer to question 4, is that the designated loading place was "Millside," state as accurately as possible the exact time when, at "Millside," the "Schwarzenbek" 's inward cargo and unnecessary ballast were completely discharged; state also the exact time when she was ready to receive her cargo; state also when you gave notice of her readiness. [137]
8. If you are able to do so, join to this deposition a copy of the notice of readiness which you gave while at "Millside," and state how the said notice was communicated to charterer or the mill.
9. State whether or not, at the time of giving the notice of readiness mentioned in your answers to the two preceding questions, the "Schwarzenbek" was prepared and ready to take in lumber.
10. State in particular whether, at the time mentioned in the preceding question, the "Schwarzenbek" was rigged for taking in lumber.
11. If your answer to the preceding question is in the negative, explain the reason or reasons why the vessel was not then rigged for taking in lumber.

12. State what stevedore or firm of stevedores loaded the cargo.
13. State how it happened that the stevedore or firm mentioned in your last answer loaded the cargo.
14. State when the stevedore or stevedores mentioned arrived on the ship, and when they commenced to load the cargo.
15. State in detail the communications you had with the charterers relative to appointment or employment of stevedores.
16. State any facts, relative to the employment or work of the stevedores who loaded the ship, which have a bearing upon the time of the commencement of the actual loading.
17. State whether, on any working lay day after March 23, 1907, the loading of the ship was for any reason interrupted or stopped, and if so, state the cause of and reason for such interruption or stoppage, and state how long the interruption continued.
18. Do you know of any other matter, not yet stated by you, that may be material to the subject of this examination, and in [138] particular the fixing of the date when the lay days of the "Schwarzenbek" began under her charter party? If you do, set forth these matters fully.

ANDROS & HENGSTLER,
Proctors for Libelants. [139]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & Co., a Corporation,

Respondent.

**Interrogatories to be Propounded to F. Unruh, at
Hamburg, Germany, on Libelants' Behalf.**

1. What is your full name, age and occupation?
2. What was your occupation during the months of March, April and May, 1907?
3. If your answer to the preceding question is, that you were then the first officer of the German Ship "Schwarzenbek," state who were then the owners of said ship, who were her charterers and where was said ship on March 4, 1907.
4. State what loading mill was designated by charterers after arrival of your ship at Royal Roads, Puget Sound, and when.
5. State generally what occurred between you, the mill and the charterer, relative to loading your ship, after arrival at Royal Roads.
6. On what day did your ship arrive at the designated loading place?
7. If your answer to question 4 is that the designated loading place was "Millside," state as

accurately as possible the exact time when, at "Millside," the "Schwarzenbek's" inward cargo and unnecessary ballast were completely discharged; state also the exact time when she was ready to receive her cargo; state also when you gave notice of her readiness.

8. State whether or not, at the time of giving the notice of readiness mentioned in your answers to the two preceding [140] questions, the "Schwarzenbek" was prepared and ready to take in lumber.
9. State in particular whether, at the time mentioned in the preceding question, the "Schwarzenbek" was rigged for taking in lumber.
10. If your answer to the preceding question is in the negative, explain the reason or reasons why the vessel was not then rigged for taking in lumber.
11. State what stevedore or firm *or* stevedores loaded the cargo.
12. State how it happened that the stevedore or firm mentioned in your last answer loaded the cargo.
13. State when the stevedore or stevedores mentioned arrived on the ship, and when they commenced to load the cargo.
14. State in detail the communications you had with the charterers relative to appointment or employment of stevedores.
15. State any facts, relative to the employment or work of the stevedores who loaded the ship,

which have a bearing upon the time of the commencement of the actual loading.

16. State whether, on any working lay day after March 23, 1907, the loading of the ship was for any reason interrupted or stopped, and if so, state the cause of and reason for such interruption or stoppage, and state how long the interruption continued.
17. Do you know of any other matter, not yet stated by you, that may be material to the subject of this examination, and in particular the fixing of the date when the lay days of the "Schwarzenbek" began under her charter-party? If you do, set forth these matters fully.

ANDROS & HENGSTLER,

Proctors for Libelants.

Due service and receipt of a copy of the within interrogatories is hereby admitted this 8th day of September, 1910.

NATHAN & FRANK,

Proctor for Respondent.

[Endorsed]: Filed Sep. 10, 1910. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [141]

[Deposition of Fritz Karl Rudolph Unruh.]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

(Answers of Witness Unruh to Interrogatories.)

Deposition of Fritz Karl Rudolph Unruh, a witness sworn and examined under and by virtue of a commission issued out of the District Court of the United States, in and for the Northern District of California, in a certain cause therein depending between Martin H. A. Elvers and Frederic A. E. Zimmer, Libelants, and W. R. Grace & Co., a corporation, respondent.

FRITZ KARL RUDOLPH UNRUH, of the city of Hamburg in the German Empire, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposeth and saith as follows:

1st. To the first interrogatory he saith:

My name is Fritz Karl Rudolph Unruh; I am thirty-five years of age, and follow the occupation of sea captain.

2d. To the second interrogatory he saith:

During the months of March, April and May,

1907, I was the chief officer of the German ship "Schwarzenbek."

ROBERT P. SKINNER, Commissioner. [142]

3d. To the third interrogatory he saith:

The owners of the "Schwarzenbek" were Messrs. Knohr & Burchard, Nachf., of Hamburg, Germany; the charterers were Messrs. W. R. Grace & Co., of San Francisco; the ship on the date named was at Royal Roads, Vancouver Island, in British Columbia.

4th. To the fourth interrogatory he saith:

Our captain received a cable instructing him to load at Millside, but upon exactly what date he received this instruction I am unable to state.

5th. To the fifth interrogatory he saith:

I had nothing to do with this matter, which was entirely the captain's business.

6th. To the sixth interrogatory he saith:

Our ship arrived at the designated loading place on March 11, 1907, at 2 o'clock P. M.

7th. To the seventh interrogatory he saith:

On the 12th of March, 1907, inward bound cargo and unnecessary ballast had been discharged at 6 o'clock P. M.; on that same date, at 6 o'clock P. M. the vessel was in her loading place and ready to receive cargo; notice of the readiness of the vessel to receive cargo was given on March 13th at about 12 o'clock, noon.

8th. To the eighth interrogatory he saith:

The ship was prepared and ready to take in lumber at 6 o'clock on the evening of the 12th of March, 1907.

9th. To the ninth interrogatory he saith:

The "Schwarzenbek" was ready and rigged for taking in lumber on the 12th of March, 1907, at 6 P. M., as far as we were able to rig the ship with our own crew. It is customary for the stevedores to bring their own crew and they admit of no interference with their work.

ROBERT P. SKINNER, Commissioner. [143]

10th. To the tenth interrogatory he saith:

We had rigged as far as we could.

11th. To the eleventh interrogatory he saith:

Captain Rennie, representing the stevedoring firm of McCabe & Hamilton, loaded the cargo.

12th. To the twelfth interrogatory he saith:

The firm next above mentioned got the contract for loading the cargo from Messrs. Bartlett & Co., of Port Townsend, Washington. Bartlett & Co. had orders from Messrs. Grace & Co.

13th. To the thirteenth interrogatory he saith:

The stevedores arrived at the ship on the 21st of March, 1907, and proceeded to set up their part of the rigging, a work which lasted about two hours. On the 21st of March, and when this was finished, the ship was ordered away from her mooring place by the manager of the mill, so that work could not begin. She was ordered to return to her loading place about three hours later, so that the work of loading actually began on the morning of March 22d, 1907.

14th. To the fourteenth interrogatory he saith:

I had nothing to do with this matter.

15th. To the fifteenth interrogatory he saith:

I have already stated what I know in regard to this matter.

16th. To the sixteenth interrogatory he saith:

The work of loading was interrupted on Monday, April 1st, on April 2d, and on April 3d we worked but half a day. April 1st was a holiday. April 2d, the stevedores would not work because the mill owners had thrown down on the landing place, mixed up with the other cargo, an excess of short stowage, on which ROBERT P. SKINNER, Commissioner. [144] only half freight rate is paid, and which the commander of the "Schwarzenbek" would not take in. The stevedores refused to throw it out, and we told them that we could not take it into the ship; whereupon they refused to work until the matter was adjusted. Work was resumed on April 3d, 1907, in the afternoon.

17th. To the seventeenth interrogatory he saith:

As far as I can say, the lay days should have commenced on the 13th day of March, because the ship had been surveyed by the surveyors, and she was in every way ready to take in cargo. That is all I can say.

F. UNRUH.

ROBERT P. SKINNER, Commissioner.

**[Certificate of Commissioner of Deposition of F. K.
R. Unruh.]**

GERMAN EMPIRE,
FREE AND HANSEATIC CITY OF HAMBURG,
Consulate-general of the
United States of America,—ss.

I, Robert P. Skinner, Consul-general of the United States of America, the commissioner named in said

commission, do hereby certify that the witness, Fritz Karl Rudolph Unruh, appeared before me, and after being duly sworn, his evidence was taken down, and read over, and corrected by him, after which he subscribed the same in my presence, on the 21st day of October, A. D. 1910, at my office in the city and State of Hamburg, Germany, and that proof has been made before me of the personal identity of said witness.

In witness whereof I have hereunto set my hand and official seal the day and year aforesaid.

[Seal] ROBERT P. SKINNER,
Commissioner for California in Hamburg, Germany.

[145]

[Deposition of Lars Friedreich Flindt.]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERIC A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

(Answers of Witness Flindt to Interrogatories.)

Deposition of Lars Friedrich Flindt, a witness sworn and examined under and by virtue of a commission issued out of the District Court of the United States, in and for the Northern District of California, in a certain cause therein depending between Martin H. A. Elvers and Frederic A. E. Zimmer,

libelants, and W. R. Grace & Co., a corporation, respondent.

LARS FRIEDRICH FLINDT, of the city of Hamburg in the German Empire, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposeth and saith as follows:

1st. To the first interrogatory he saith:

My name is Lars Friedrich Flindt; I am 34 years of age, and am a sea captain.

2d. To the second interrogatory he saith:

Captain of the ship "Schwarzenbek."

ROBERT P. SKINNER, Commissioner. [146]

3d. To the third interrogatory he saith:

The owners of the ship were Knohr & Burchard, Nachf., of Hamburg, Germany; the charters were W. R. Grace & Co., of San Francisco; and the ship was at Royal Roads, B. C., on March 4, 1907.

4th. To the fourth interrogatory he saith:

Millside was designated on the 6th and 7th of March, 1907.

5th. To the fifth interrogatory he saith:

On arrival there no orders were found. I wired W. R. Grace & Co. for orders on March 2d, 1907, and received orders on March 6th, "Millside"; but I did not know which "Millside." I therefore wired a second time and on March 7th I received additional telegraphic instructions stating "Millside, Frazer River."

6th. To the sixth interrogatory he saith:

We arrived at Millside March 11, 1907, at 2 o'clock P. M.

7th. To the seventh interrogatory he saith:

We arrived March 11, and on March 12, having in the meantime discharged 50 tons of ballast by evening, the ship was ready to take in cargo on the 13th of March; between 11 and 12 o'clock on the morning of the 13th, I gave notice that we were ready to receive cargo.

8th. To the eighth interrogatory he saith:

The notice was presented verbally by myself and in writing to the manager of the mill. I am unable to present a copy of this notice at this time; it is in the copy book at home.

9th. To the ninth interrogatory he saith:

The ship was prepared and ready to take in lumber
ROBERT P. SKINNER, Commissioner. [147]
at the moment when notice of such readiness was communicated to the manager of the mill.

10th. To the tenth interrogatory he saith:

The ship was rigged so far as it was customary for a ship to be rigged for that purpose.

11th. To the eleventh interrogatory he saith:

We could do nothing more; all that had to be done beyond what was already done fell to the lot of the stevedore.

12th. To the twelfth interrogatory he saith:

Grace and Co., the charter-party, were to nominate the stevedore. These stevedores were Bartlett & Co., of Port Townsend, Washington.

13th. To the thirteenth interrogatory he saith:

Bartlett & Co. did not actually act as stevedores but they were appointed stevedores by Grace & Co., and they themselves sublet the contract to Messrs. McCabe and Hamilton, who performed the work.

14th. To the fourteenth interrogatory he saith:

The stevedores arrived on the ship on March 21, 1907, and started to rig up their gear on that date. They commenced to load on March 22d.

15th. To the fifteenth interrogatory he saith:

On arrival at Millside no stevedores came on board, nor could I find any on shore; I then wired W. R. Grace and Co. on March 13th to name a stevedore, but I received no reply. I wired again, then Grace and Co. replied to me "Bartlett, stevedore."

16th. To the sixteenth interrogatory he saith:

In my opinion the delay arose from the time lost in the appointment of stevedores and after the stevedores were appointed further time was lost in order to give time to the mill. There was not sufficient lumber to start with.

ROBERT P. SKINNER, Commissioner. [148]

17th. To the seventeenth interrogatory he saith:

The mill put a large quantity of short stowage material at our disposition, for which we only got half freight, and for this reason I would not take it. I would only take this material for full freight and the stevedores would not work it but ceased operations from April 2d to April 3d at midday, when work was resumed.

18th. To the eighteenth interrogatory he saith:

In my opinion the 1st of April does not count as a lay day as it was a holiday, being Easter Monday. The lay days which were stipulated in the charter expired on April 19th. The ship was loaded on May 15, 1907, this making 26 days demurrage. If Easter Monday were counted it would be 27th days. The

ship was passed by the underwriters' surveyors on March 13th, 1907.

F. FLINDT.

ROBERT P. SKINNER, Commissioner.

[Certificate of Commissioner to Deposition of L. F. Flindt.]

GERMAN EMPIRE,

FREE AND HANSEATIC CITY OF HAMBURG,

Consulate-general of the

United States of America,—ss.

I, Robert P. Skinner, Consul-general of the United States of America, the commissioner named in said commission, do hereby certify that the witness, Lars Friedrich Flindt, appeared before me, and after being duly sworn, his evidence was taken down, and read over, and corrected by him, after which he subscribed the same in my presence, on the 25th day of October, A. D. 1910, at my office in the city and State of Hamburg, Germany, and that proof has been made before me of the personal identity of said witness.

ROBERT P. SKINNER, Commissioner. [149]

In witness whereof I have hereunto set my hand and official seal the day and year aforesaid.

[Seal]

ROBERT P. SKINNER,

Commissioner for California in Hamburg, Germany.

Deposition of 1966 words:

Fee No. 39:

First 500 words.....	\$10.00	Marks 42.40
----------------------	---------	-------------

For each succeeding 100		
-------------------------	--	--

words	or	fraction	
-------	----	----------	--

thereof 50 cents.....	7.50	Marks 31.80
-----------------------	------	-------------

Represented by fee		
stamps	\$17.50	Marks 74.20
Fee No. 40:		
First 100 words.....	\$.50	Marks 2.15
For each succeeding 100		
words or fraction		
thereof 25 cents.....	4.75	Marks 20.15
<hr/>		
(Paid to A. W. Pentland,		
copyist)	\$ 5.25	Marks 22.30
Total	\$22.75	Marks 96.50

Fee #818.

(Four Fee Stamps.)

(Seal)

(U. S. Consulate General)

(Oct. 26, 1910.)

(Hamburg, Germany.)

[Endorsed]: Opened and filed as per stipulation
Nov. 18, 1910. Jas. P. Brown, Clerk. By M. T.
Scott, Deputy Clerk. [150]

(Libelants' Exhibit "4.")

New York)	W. R. GRACE & CO.,	Valparaiso)
Lima)Peru	614 California St.,	Santiago)
Callao)	San Francisco.	Concepcion)Chile
Arequipa)	Cable Address: "Grace."	Valdivia)
La Paz)Bolivia	London Agents: GRACE BROTHERS	Iquique)
Oruro)	& CO., LTD.	Antofagasta)

San Francisco, Cal., Aug. 20th, 1908.

Mr. L. T. Hengstler,

Kohl Bldg., City,

Dear Sir:—

“SCHWARTZENBEK.”

As per your request we enclose herewith schedule

of lay days as sent our Lima friends in connection with Captain's claim for demurrage.

Yours very truly,

W. R. GRACE & CO.

Fraser River Sawmills
Ltd.
Now Fraser Lumber Mill
Co.

{ Apr. 15, 1909.
Bond of Indemnity
for \$2964.72 by
Fraser River Lum-
ber Co., Ltd.

Agree to defend action for
demurrage & for judg-
ment

{ McRay, Pres. Prin.
Craig, Treas.
McRay,
Craig,

Sureties

B/L sent by W. R. Grace to Frank (March 10, 1909.)

[151]

(Copy.)

W. R. GRACE & CO.,

San Francisco.

“SCHWARTZENBEK.”

March 3. Sunday.

4. Arrived Royal Roads.

6. We wired “We will load your ship Mill-
side.

8. Capt. wired “Want definite instructions
when to proceed to Millside.”

8. We wired “Proceed to Millside as soon
as you are ready.”

11. Capt. wired “Ready to load, nominate
stevedore.”

12. We wired “Bartlett Stevedore.”

12. Capt. wired “Ready load wire instruc-
tions stevedoring immediately.”

12. We wired "As wired this morning Bartlett Port Townsend will stevedore per Charter."
13. Capt. wired "Now Millside 3 days still awaiting stevedore. Will hold you liable all expense and delay."
13. Capt. wired "Bartlett"—"Ready but no stevedore here yet—advice."
14. We wired "Communicate with Bartlett—
We are not concerned in arrangement beyond nominate responsible stevedore who will load according charter."
14. Bartlett wired Capt.—"Capt. C. W. Renny will load your ship for us."
18. Capt. wired "Still waiting stevedore."
21. Vessel working ballast and rigging for cargo. Master notified mill ready to load.
22. Mill says rigging not completed until morning 22d; lay days commence 24 hours.

	Lay days
23. Lay days commence.	1
24. Sunday.	
25.	1
26.	1
27.	1
28.	1
29. Good Friday.	
Captain wired—"Mill putting on wharf	

timbers less than 16 ft.—I refuse to take unless full freight paid.”

30.

31. Sunday.

April 1. Easter Sunday.

Capt. stopped loading, refusing to take lengths under 16 ft. without having guarantee that ship would receive full freight.

Bartlett wired Capt.—“Your ship and Owners will be held responsible for any delay caused by your refusal to accept lumber under 18 feet as provided by charter at Charterer’s option.”

2. No work.

Capt. wired—“Work is stopped. No reply to my telegram. Will hold you responsible for delays and expenses.”

[152]

W. R. GRACE & CO.,

San Francisco.

Capt. wired later—“Will you full freight on short lengths under 16 feet except what ship orders.”

April 3. Capt. wired Bartlett—“Will charterers pay full freight on lengths under 16 ft. except what ship requires for stowage.

We wired—“Short lengths is required half rate—otherwise pays full freight.”

Bartlett wired Capt.—“Charterers will pay freight in accordance terms of Charter Party. Loading recommenced

in afternoon on same cargo Capt. had
previously refused.

	Lay days
4.	$\frac{1}{2}$
5.	1
6.	1
7. Sunday	
8.	1
9.	1
10.	1
11.	1
12.	1
13.	1
14. Sunday	
15.	1
16.	1
17.	1
18.	1
19.	1
20.	1
21. Sunday	
22.	1
23. Strike commenced	
24. "	
25. "	
26. "	
27. "	
28. Sunday	
29. Strike	
30. "	
May 1. "	
2. "	

3. "
4. "
5. Sunday
6. Strike
7. "
8. "
9. "
10. " [153]

W. R. GRACE & CO.

San Francisco.

	Lay days
May 11. Strike settled; loading resumed	1
12. Sunday	
13.	1
14.	1
15.	..1
	<hr/>
	26½ days
	<hr/>

[154]

COPY OF TELEGRAMS EXCHANGED WITH
CAPT. FLINDT, SHIP SCHWARZENBEK;

FROM Mar. 4th—4:30 P. M.

SCHWARZENBEK arrived wire instructions.

TO Mar. 6th—5:45 P. M.

We will load your ship at Millside.

FROM Mar. 8th—3:55 P. M.

Want definite instructions when to proceed to Millside.

TO Mar. 8th—4:40 P. M.

Proceed to Millside as soon as you are ready.

FROM 11th, rec'd. 12th—9:00 A. M.

Ship SCHWARZENBEK ready load, nominate stevedore.

TO Mar. 12th—10:30 A. M.

Bartlett stevedore.

FROM Mar. 12th—4:20 P. M.

SCHWARZENBEK ready load wire instructions stevedoring immediately.

TO Mar. 12th—4:30 P. M. ,

As wired this morning, Bartlett Port Townsend will stevedore per charter.

FROM Mar. 13th, rec'd. 14th—9:00 A. M.

SCHWARZENBEK now Millside 3 days still waiting stevedore. Will hold you liable all expense and delay incurred.

TO Mar. 14th—10:30 A. M.

Communicate with Bartlett. We are not concerned in the arrangement, beyond nominating responsible stevedore who will load according charter.

FROM Mar. 18th, rec'd 19th—9:00 A. M.

SCHWARZENBEK still waiting stevedore.

[155]

COPY OF CABLEGRAMS (TELEGRAMS) EX-
CHANGED BETWEEN BARTLETT & CO.
and MESSRS. CAPTAIN FLINDT OF GER.
SHIP "SCHWARZENBEK."

Seattle, Wash., June 1st, 1907.

New Westminster, B. C., Mar. 13, 1907.

Bartlett & Co.

Port Townsend, Wn.

Schwarzenbek ready but no Stevedore here yet,
Advise.

253 P. M.

FLINDT,

Master.

(Received by Bartlett & Co., Seattle, March 14th,
1907.)

Seattle, Wn., Mar. 15th, 1907.

Captain Flindt.

Ship "SCHWARZENBEK," Millside, B. C.,
via Westminster.

Captain C. W. Renny will load your ship for us.

BARTLETT & CO.

By Phone Millside, B. C., April 1st, 1907.

Bartlett & Co.,

Seattle, Wn.

SCHWARZENBEK. Captain has stopped loading, refusing to take lengths under sixteen foot without having guarantee that ship shall receive full freight for same.

H. D. HYLTON,

Inspector for W. R. Grace & Co.

Seattle, Wn., April 1st, 1907.

The Master Ship SCHWARZENBEK,

Millside, B. C.

Your ship and owners will be held responsible for any delay caused by your refusal to accept lumber under sixteen feet as provided by charter party at charterer's option.

BARTLETT & CO.,

Agents for W. R. Grace & Co. [156]

TELEGRAMS REGARDING SHIP "SCHWARZENBEK"—*continued.*

Reed. 4:30 P. M. Vancouver, B. C., Apr. 3, 1907.
Bartlett & Co.

Stevedores, Seattle, Wn.

Will charterers pay full rate of freight on short lengths under sixteen feet except what ship requires for broken stowage—answer immediately.

FLINDT,
Schwarzenbek.

Seattle, Wn., April 3d, 1907.

Captain Flindt:

Ship "SCHWARZENBEK," Vancouver, B. C.

Charterers will pay freight in accordance with terms of charterer's party.

BARTLETT & CO.

3:00 P. M. New Westminster, B. C.

April 25th, 1907.

Bartlett & Co.,

Room 6, Coleman Dock, Seattle, Wn.,

SCHWARZENBEK not loading, strike on.

H. D. HYLTON.

[Endorsed]: Filed June 9, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [157]

(Libelants' Exhibit "5.")

Rec'd. Mar. 30, 1907.

Ans'd.

Millside, B. C., Mch. 23d, 1907.

Messrs. Bartlett & Co.

Colman Dock,

Seattle, Wn.

Gentlemen:—

The Ger. Ship "Schwarzenbek" began loading yes-

terday at 11 A. M. Order #402.

The Captain has so far refused to sign for any short stowage as the Mill Co. have not kept short lengths separate on wharf. I hardly think we will be able to get him to sign for very much. Please send me a copy of order #402. Will write again in few days.

Very Resp.

H. D. HYLTON. [158]

ORDER #402. "SCHWARZENBEK."

Millside, B. C., Mch. 31st, 1907.

Messrs. W. R. Grace & Co.

San Francisco, Cala.

Gentlemen,—

Have about 315 M. feet of Merch. and 110 M. feet of Select loaded on the Ger. Ship "Schwarzenbek." This lumber so far is averaging good both as to quality and manufacture. Have only loaded 5 M. feet short lengths (under sixteen feet) all of which the Ship has signed for.

The Mill Co. has given the Captain notice that short lengths must be taken on and I think that the Captain has already wired you regarding it. The Mill Co. has about 50 M. feet of short lengths already cut and there has been a great deal of complaint from both Mill People and Stevedores regarding the extra handling of Stowage. Mr. Fowle, the Mill Co. Supt. has not said much about it.

Very Resp.

H. D. HYLTON, [159]

ORDER #410—"SCHWARZENBEK."

Millside, B. C., April 11th, 1907.

Messrs. W. R. Grace & Co.

San Francisco, Cala.

Gentlemen:—

We have loaded this P. M. about 840 M. feet of lumber, 230 M. feet of which is select, the 1x6 being nearly out. In my last letter I advised you that the Mill Co. would mark the balance of the select lumber but they would only mark the balance of 1½x6 and not the 1x6 as they thought it was *to* near out to bother about the marking. During last week or so they have had poor logs and lumber while up to grade is not any better than it should be, however they are expecting another Raft soon. In my next letter I think I will be able to give more definite information as to the capacity of Ship. I do not believe that the Mill will be able to cut enough to keep up with the loading as they are working on several other Orders.

Very truly,

H. D. HYLTON. [160]

Rec'd Apr. 17, 1907.

Ans'd No.

ORDER #410—"SCHWARZENBEK."

Millside, B. C., Apl. 13th, 1907.

Messrs. W. R. Grace & Co.

San Francisco, Cala.

Gentlemen,—

We worked Ship only one hour today as we ran out of lumber this morning. There is about 20 M feet of long timbers on Dock which they are holding

for the Deck but Ship does not want them until the Tween Decks is filled up. The Mill has not cut very much for us today as their merchantable logs have not yet arrived. Expect to begin work again Monday morning.

Have about 245 M feet of the Select loaded. The lower Hold will hold about 1050 M feet. The Select is running a higher per cent clear than any that I have ever shipped. I can say nothing definite as to time of completing loading.

Very respectfully,

H. D. HYLTON. [161]

Rec'd Apr. 18, 1907.

Ans'd File.

Ex. F.

ORDER #410—"SCHWARZENBEK."

Millside, B. C., April 15th, 1907.

Messrs. W. R. Grace & Co.

San Francisco, Cala.

Gentlemen,—

In my last Saturdays report to you I reported total of 900 M feet loaded but according to corrected figures from Tallyman there was only 852 M feet. Begun work to-day at 1 P. M. and had wharf about cleaned up at quitting this evening. The Mill starts in to-night running one quarter overtime each day.

Very Respectfully,

H. D. HYLTON. [162]

Rec'd Apr. 25, 1907.

Ans'd file with papers.

ORDER #410—"SCHWARZENBEK."

Millside, B. C., Apl. 20th, 1907.

Messrs. W. R. Grace & Co.

San Francisco, Cala.

Gentlemen,—

We have on Ship 180 M feet of 1x6 Select and about 115 M feet of the 1½x6 also select.

In addition to the above have loaded 9 M feet of Short lengths—1x6 Select—as stowage and the Mill Co. expect to ship more as they have it piled separately on the Dock. The percentage of short lengths were out on the 1x6 Select before the last 9 M feet was loaded on Ship. She should carry somewhere near 1675 M as they will carry six inches more on Deck than usual. The Select still averages large per cent clear while the grade of Merchantable is not uniform as they are allowing some clear and select in this also. Have only worked about 36 hours this week as Mill has not been able to cut lumber but they did better last of the week as were on better logs.

Very Truly,

H. D. HYLTON.

Lima

R [163]

Phone 188.

P. O. Box 573.

THE WINDSOR.

P. O. Bilodeau, Proprietor

New Westminster, B. C. April 24th, 1907.

Messrs. Bartlett & Co.

Seattle, Wn.

We have loaded no lumber on Ship "Schwarzen-

bek" this week as the Mill did not have much ahead on Monday morning and the Stevedore worked men on Steamer "Georgia." Yesterday noon the Longshoremen struck and I have been advised that at their meeting in Vancouver last night there was no agreement reached. I will advise you as soon as work is resumed.

Very Truly,

H. D. HYLTON.

[Endorsed]: Filed June 9, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [164]

(Libelants' Exhibit "6.")

Grace Brothers & Co., Ltd., Ship "Schwarzenbek."
London.

COPY.

Vancouver, B. C., March 19th, 1907.

Capt. C. W. Rennie,
Vancouver.

London.
1208.

Dear Sir:—

With reference to the stevedoring of my vessel under Clause 68 of her Charter Party, it reads that the cargo is to be stowed under the master's supervision and direction, charterers stevedore to be employed not exceeding \$1.10. On my arrival at Millside I notified charterers, Messrs. W. R. Grace & Co., of San Francisco, who advised me that Bartlett of Port Townsend, would stevedore as per charter. I wired this gentleman, who in turn wired me, under date of 15th inst. that you would load ship for him.

Up to the time of writing nothing has been done towards stevedoring my vessel. I have been at my loading berth ready to receive cargo since the 12th inst. and I shall be obliged if you will advise me by return whether you intend to stevedore the vessel, if so, please state date on which you intend to start work, if not, I shall have to make other arrangements charging the charterers with all expenses I may have to go to.

Please give messenger reply to this by return, and oblige,

Yours very truly,

(Signed) F. FLINDT,

Master.

For true copy:

(S.) Knoehr & Burchard, Nfl.

[Endorsed]: Filed June 9, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [165]

(Libelants' Exhibit "7.")

Dres. BARTELS, von SYDOW, REME & RATJEN,
NOTARE.

HAMBURG.

—oOo—

(Notarial

(German Seal)

Revenue

Stamp.)

KNOW ALL MEN BY THESE PRESENTS
that we the undersigned, MARTIN HERMANN
ADOLPH ELVERS and FRIEDRICH AUGUST

EMIL ZIMMER, both of the City of Hamburg, in the Empire of Germany, ship owners, doing business in said city as a copartnership under the name and style of Knohr & Burchard Nfl., owner of the steel ship called the "Schwarzenbek," have made, constituted and appointed, and by these presents do make, constitute and appoint Louis T. Hengstler of the City and County of San Francisco, State of California, its true and lawful attorney, for it and in its name to prosecute its claim against the firm of W. R. Grace & Co. of San Francisco, for demurrage under a Charter of said ship "Schwarzenbek," dated August 16th, 1906, by action at law, suit in equity of admiralty, or otherwise, and to collect, receive, and upon the receipt thereof to give acquittances or other sufficient discharges for all sums of money, debts, accounts, and other demands whatsoever, due, owing, and payable to said Knohr & Burchard Nfl.

Giving and granting to its said attorney full [166]
239/09

power and authority to do and perform any and every act and thing whatsoever requisite and necessary to be done in the premises and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of the terms of this instrument.

IN WITNESS THEREOF we have hereunto set

our hands and seals at Hamburg, this 22d of December, A. D. 1908.

A. ELVERS,

in firm of KNOHR & BURCHARD NFL. [Seal]

A. ZIMMER,

in form of KNOHR & BURCHARD NFL. [Seal]

No. of registry—22,945.

CITY AND STATE OF HAMBURG.

On this twenty-second day of December, A. D. one thousand nine hundred and eight, before me, Hans Rudolf Ratjen, Doctor of Laws, a Notary Public in and for this City, personally appeared Mr. Martin Hermann Adolph Elvers and Mr. Friedrich August Emil Zimmer, both of this city, ship owners, doing business in said city as a copartnership under the name and style of Knohr & Burchard Nfl., to me known to be the individuals described [167] in and who executed the foregoing instrument and acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned in my presence.

IN WITNESS THEREOF I have hereunto set my hand and seal of office the day and year last above written.

[Notarial Seal]

DR. HANS RATJEN.

United States Consulate-General at Hamburg,—ss.
No. 1210.

I, Robert P. Skinner, Consul-General of the United States of America at Hamburg, do hereby certify that the seal and signature of Hans Rudolf Ratjen, Notary Public at Hamburg, to the instrument of

writing hereto annexed are true and genuine, and as such are entitled to full faith and credit.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my Seal of Office, this 23d day of Dec., A. D. 1908.

[Seal]

ROBERT P. SKINNER,

United States Consul-General.

(Consular Service Stamp) [168]

HAMBURG. Dres. BARTELS, von SYDOW,
REME & RATJEN, NOTARE.

(Stempel) No. 943 3

(Abgabe)

(Hamburg)

Zwei M 50 r pr. 2 Expl.

den 18 Jan. 1908.

Truman.

(The following has been translated from Spanish, in accordance with order of Court, dated February 14th, 1916, a copy of which is included in this transcript.)

Register No. 58744.

In this free and hanseatic City of Hamburg on the seventeenth (17) day of January, nineteen hundred and eight, before me, George Adolf Reme, Doctor in jurisprudence, Notary Public, duly sworn as appears by his number and the undersigned witnesses, Mr. Theodore Oscke and Mr. Wilhelm Heller, residents of this city, personally appeared Friedrich August Emil Zimmer, Shipping Broker and Ship-owner residing in Altonas, over the age of majority, managing partner, personally responsible,

of the copartnership doing business in this City under the firm name of Knohr & Burchard, Nfl., as appears by the commercial registry of the Tribunal of Letters, Hamburg, which I have had before me and who I hereby certify is known to me to be the deponent and has the legal qualifications to obligate himself, and he deposed: that in the name of his said firm of Knohr & Burchard, Nfl., in Hamburg as owners of the German ship "Schwarzenbek," grants and confers their Power of Attorney, full, absolute, complete and sufficient as may be necessary or required by law, to the Embassy of the German Empire at Lima, Republic of [169] Peru or whomsoever may be acting for it, that it may judicially or extra judicially take care of all the rights, interests, claims and demands of the firm executing these presents, against Messrs. W. R. Grace & Company, Lima, and recover, demand and collect all sums due for demurrage relating to the ship "Schwarzenbek" and other expenses owing & due the grantors by said W. R. Grace & Company; to grant acquittances or extensions, give receipts, discharges and valid releases for all sums received.

In the event that said Attorney cannot settle these matters amicably, that it may be able to protect and defend the interests of grantors by all lawful means which may be necessary, acting as plaintiff or as defendant to ask for an inquiry, appoint Counsel and Defensors to appear before Court and, out of it, to have parties summoned to appear before competent Tribunals designated to conciliate, have favorable judgments executed, make requisitions,

petitions and citations or receive them, appeal, object, challenge, compromise, protest, prove, admit or refute the proofs of the adversary, to take oaths or require them, attach, prosecute attachments, or release attachments, ask for the sale and adjudication of property, terminate transactions & amicable settlements, nominate all kinds of appraisers, arbitrators or friendly adjusters, accept grants of property and do all things which may be necessary; for the authority which may be required, is hereby granted without limitation, together with free, full and general administration, with authority to substitute this Power of Attorney, wholly or in part and to revoke substitutions as often as it desires and lastly to do all things that shall be necessary for the interests of the grantors according to the laws obligating themselves to ratify & indemnify according to law. [170]

Done in Hamburg on the day and year hereinabove mentioned and the deponent has signed this Power of Attorney with the witnesses after having read and ratified its contents.

In witness whereof, I, the Notary, have signed these Presents and sealed them with my official Seal.

KNOHR & BURCHARD, NFL.

[Seal] G. A. REME.

THEO. OSCKE,

Witness.

W. HELLER,

Witness.

The Consul-General of Peru in Hamburg, certifies that the signature which precedes is the authentic

signature of Georg Adolf Reme, Notary Public of this City, and that he is in the actual exercise of the functions of his office.

In witness whereof, signs and seals these presents in Hamburg on the eighteenth day of January, nineteen hundred and eight.

Number of order, 9.

Number of tariff, 59.

Fees collected M. 8.00, \$2.00.

(Peruvian Consular Stamp) The Consul-General,

[Seal] JORGE CORRVAS. [171]

HAMBURG. Dres. BARTELS, von SYDOW,

REME & RATJEN, NOTARE.

(Stempel)

(Abgabe) No. 943

(Hamburg)

Duplicate.

Zwei M 50 r pr. 2 Expl.

den 18 Jan. 1908.

Truman.

Register No. 58745.

In this free and hanseatic City of Hamburg on the seventeenth (17) day of January, nineteen hundred and eight before me George Adolf Reme, Doctor in jurisprudence, Notary Public, duly sworn as appears by his number and the undersigned witnesses Mr. Theodore Oscke and Mr. Wilhelm Heller, residents of this city personally appeared Friedrich August Emil Zimmer, Shipping Broker and Shipowner residing in Altonas, over the age of majority, managing partner, personally responsible, of the co-partnership doing business in this city under the

firm name of Knohr & Burchard, Nfl., as appears by the commercial registry of the Tribunal of Letters, Hamburg, which I have had before me and who I hereby certify is known to me to be the deponent and has the legal qualifications to obligate himself, and he deposed: that in the name of his said firm of Knohr & Burchard, Nfl., in Hamburg as owners of the German ship "Schwarzenbek," grants and confers their Power of Attorney, full, absolute, complete and sufficient as may be necessary or required by law, to the Embassy of the German Empire at Lima, Republic of [172] Peru, or whomsoever may be acting for it, that it may judicially or extra judicially take care of all the rights, interests, claims and demands of the firm executing these presents, against Messrs. W. R. Grace & Company, Lima and recover, demand and collect all sums due for demurrage relating to the ship "Schwarzenbek" and other expenses owing and due the grantors by said W. R. Grace & Company; to grant acquittances or extensions, give receipts, discharges and valid releases for all sums received.

In the event that said Attorney cannot settle these matters amicably, that it may be able to protect and defend the interests of grantors by all lawful means which may be necessary, acting as plaintiff or as defendant to ask for an inquiry, appoint Counsel and Defensors to appear before Court and, out of it, to have parties summoned to appear before competent Tribunals designated to conciliate, having favorable judgments executed, make requisitions, petitions and citations or receive them, appeal, object, challenge,

compromise, protest, prove, admit or refute the proofs of the adversary, to take oaths or require them, attach, prosecute attachments, or release attachments, ask for the sale and adjudication of property, terminate transactions and amicable settlements, nominate all kinds of appraisers, arbitrators or friendly adjusters, accept grants of property and do all things which may be necessary; for the authority which may be required is, hereby granted without limitation, together with free, full and general administration, with authority to substitute this Power of Attorney, wholly or in part and to revoke substitutions as often as it desires and lastly to do all things that shall be necessary for the interests of the grantors according to the laws obligating themselves to ratify and indemnify according to law. [173]

Done in Hamburg on the day and year hereinabove mentioned and the deponent has signed this Power of Attorney with the witnesses after having read and ratified its contents.

In witness whereof, I, the Notary, have signed these Presents and sealed them with my official Seal.

KNOHR & BURCHARD, NFL.

[Seal]

G. A. REME.

THEO OSCKE,

Witness.

W. HELLER,

Witness.

The Consul-general of Peru in Hamburg, certifies, that the signature which precedes is the authentic signature of Georg Adolf Reme, Notary Public of this city, and that he is in the actual exercise of the functions of his office.

In witness whereof, signs and seals these presents
in Hamburg on the eighteenth day of January, nine-
teen hundred and eight.

Number of order, 10.

Number of tariff, 55.

Fees collected M. 8.00, \$2.00.

(Peruvian Consular Stamp.)

The Consul-general.

[Seal]

JORGE CORRVAS.

[Endorsed]: Filed June 9, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [174]

(Libelants' Exhibit "8.")

KNOHR & BURCHARD, NFL.,

Inhaber: (A. Elvers.

(A. Zimmer.

Scotts Code 1896. A B C Code 1901.

Telegram-Adresse: Knohrhard, Hamburg.

Reederei-Abteilung.

(Flag)

Hamburg 11, den 26th May, 1910.

Naptunhaus.

Schiff: "SCHWARZENBEK."

eis. o. stahl.

Tons Schwergut.

4 M. Bark "Reinbek" ca. 4450

4 M. Bark "Schurbek" " 4000

4 M. Bark "Eilbek" " 3900

4 M. Bark "Schiffbek" " 3900

4 M. Bark "Wandsbek" " 3700

4 M. Bark "Barmbek" " 3350

Vollschiff "Schwarzenbek" " 3300

Vollschiff "Flottbek" " 3100

Vollschiff	“Tarpenbek”	.....	“	3000
Barkschiff	“Ellerbek”	.....	“	2550
4 M. Bark	“Goldbek”	.....	“	4350
4 M. Bark	“Fischbek”	.....	“	3800
Vollschiff	“Lasbek”	.....	“	3850
Vollschiff	“Steinbek”	.....	“	3700

Messrs. ANDROS & HENGSTLER,
San Francisco (Cal.),

Dear Sirs,

We duly received your favour of the 27. November 1909, regarding the case “Schwarzenbek”/W. R. Grace & Co., for demurrage claim, contents of which had our careful attention.

As we are since that date without any further news from your goodselves we should feel very much obliged to you by informing us, if there are any prospects for a prompt settlement of our claim.

Awaiting your further good news, we remain, Dear Sirs,

Yours Faithfully,
KNOHR & BURCHARD, Nfl.

(COPIst) [175]

KNOHR & BURCHARD NFL.

Reederei-Abteilung.

A B C Code 1901.

Telegramm-Adresse: Knohrhard, Hamburg.

(Flag)

Segler-Flotte.

eis. o. stahl.	Tons Schwergut.
4 M. Bark “Reinbek”	..... ca. 4450
4 M. Bark “Jersbek”	..... “ 4400
4 M. Bark “Goldbek”	..... “ 4350

4 M. Bark "Thielbek"	"	4350
4 M. Bark "Schurbek"	"	4000
4 M. Bark "Schiffbek"	"	3950
4 M. Bark "Eilbek"	"	3900
4 M. Bark "Isebek"	"	3800
4 M. Bark "Wandsbek"	"	3750
4 M. Bark "Barmbek"	"	3350
Vollschiff "Lasbek"	"	3850
Vollschiff "Steinbek"	"	3700
Vollschiff "Schwarzenbek"	"	3300
Vollschiff "Flottbek"	"	3100
Vollschiff "Tarpenbek"	"	3000
Barkschiff "Ellerbek"	"	2550
Barkschiff "Osterbek"	"	2550

Hamburg 11, den 16th April, 1912.

Neptunhaus.

Messrs. ANDROS & HENGSTLER,

624 Kohl Building,

San Francisco, Cal.

Dear Sirs:

"SCHWARZENBEK." We duly received your favour of the 7th February, regarding the lawsuit of the "Schwarzenbek" against W. R. Grace & Co., of your city, for demurrage and are very sorry to hear that it will be some time before this matter can be settled on account of the bad state of your Courts.

We cannot understand how such a state is possible and should think a change would be made if addressing a petition to the competent authorities.

Awaiting your further early good news on the subject,

Yours faithfully,
p. p. KNOHR & BURCHARD, Nfl.
A. ZIMMER.

(Copist)

[Endorsed]: Filed June 9, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [176]

(Respondent's Exhibit "A.")

Phone 188.

P. O. Box 573.

THE WINDSOR,

P. O. Bilodeau, Proprietor.

Order #410 "Schwarzenbek."

New Westminster, B. C.,

April 27th, 1907.

Rec'd May 1, 1907.

Ans'd File

Ex F.

Messrs. BARTLETT & CO.,

Seattle, Wn.

Gementlemen:

Captain Rennie informed Mr. Fowle this morning over the Phone that he would begin work loading "Schwarzenbek" again on next Monday morning. They may put on a "Scab" crew of longshoremen.

No work has been done this week, and the Mill Co. has on Dock not less than 325 M feet of lumber. If we get started on Monday morning should complete loading about May 11th.

Very truly,
H. D. HYLTON. [177]

210

Martin H. A. Elvers et al. vs.

Phone 188.

P. O. Box 573.

THE WINDSOR,

P. O. Bilodeau, Proprietor.

Order #410 "Schwarzenbek."

New Westminster, B. C., April 30th, 1907.

Messrs. W. R. Grace & Co.,

San Francisco, Cal.

Gentlemen:

We began loading yesterday afternoon and the Stevedore is using the Ships Crew and do not think they are going to be able to handle more than about 45 M ft. per day. The strike of Longshoremen is still on. The manufacture of lumber is only fairly good but on the whole it is well above grade ordinarily shipped.

Very respectfully,

H. D. HYLTON. [178]

Phone 188.

P. O. Box 573.

THE WINDSOR,

P. O. Bilodeau, Proprietor.

Millside, B. C., May 4th, 1907.

Messrs. Bartlett & Co.,

Seattle, Wash.

Gentlemen:

Monday afternoon next will want to begin taking in short lengths 1x6 select for Beam Filling between Decks and the Ship may want 20 or 30 M feet more. The short lengths are scarce in balance of cargo as they came pretty thick at first. Have 1260 M feet

loaded this P. M. and should finish about the 4th inst.

Yours respectfully,

H. D. HYLTON. [179]

Phone 188.

P. O. Box 573.

THE WINDSOR,

P. O. Bilodeau, Proprietor.

Order \$410 "Schwarzenbek."

Millside, B. C., May 4th, 1907.

Messrs. W. R. Grace & Co.,

San Francisco, Cal.

Gentlemen:

I do not think that the ship will carry as much as was previously reported as the Ships' Crew are not doing a very good job of stowing cargo—however, she should carry at least the 1650 ~~M~~ feet total. The strike is still on and Stevedore has not been able to get competent men to replace the old crew. Lumber is good—am getting fine cargo.

Very truly,

H. D. HYLTON. [180]

Phone 188.

P. O. Box 573.

THE WINDSOR,

P. O. Bilodeau, Proprietor.

Order #410 "Schwarzenbek."

Millside, B. C., May 9th, 1907.

Messrs. Bartlett & Co.,

Seattle, Wash.

Gentlemen:

Yesterday being a German holiday, we did not work and are not working to-day as Captain has stopped work of loading until an experienced crew is

furnished by Stevedore. She will carry some less than 1650 ~~M~~ feet. Will advise you as soon as we get started again. About 1400 ~~M~~ feet loaded.

Very truly,

H. D. HYLTON.

Please forward to Messrs. W. R. G. & Co.

H. [181]

Phone 188.

P. O. Box 573.

THE WINDSOR,

P. O. Bilodeau, Proprietor.

Order #410 "Schwarzenbek."

Millside, B. C., May 11th, 1907.

Rec'd May 17, 1907.

Ans'd.

Messrs. Bartlett & Co.,

Seattle, Wn.

Gentlemen:

The strike is settled and we have been working to-day and are going to put in all the time possible until ship is finished loading. Expect to finish on the 14th (next Tuesday).

Respectfully,

H. D. HYLTON. [182]

Order #410.

Seattle, Wash., May 16th, 1907.

Messrs. W. R. Grace & Co.,

San Francisco, Cala.

Gentlemen:

Completed loading ship "Schwarzenbek" yesterday at 3:30 P. M. with lumber furnished by the Frazer River Saw Mill Co. Ltd. of Millside, B. C.

The cargo consists of about 1600 **M** ft. total, of which there is 216 **M** ft. of 1x6 select, 132 **M** ft. of 1½x6 and 1252 **M** ft. of Merchantable.

The 1x6 select runs 75% clear about one-half of which is vertical grain; the 1½x6 runs about the same % of clear and 10% vertical. In sizes under 4x4 in Merchantable lot there is an average of 20% clear; sizes 4x4 and up there is a fair % of clear and select. The manufacture of both select and merch. is only fair and lumber rejected was mostly on account of poor manufacture. Taking the whole cargo it is the best that I have shipped or seen shipped to the west coast for several years. The stowing of a part of cargo by ship's crew resulted in a loss of space amounting to nearly, if not quite 75 **M** feet.

Very respectfully,

H. D. HYLTON.

[Endorsed]: Filed June 9, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [183]

(Respondent's Exhibit "B.")

By this Public Instrument hereinafter contained be it known and made manifest to all people that on the sixteenth day of May, in the year of our Lord one thousand nine hundred and seven personally appeared and presented himself before me, CHARLES GARDINER JOHNSON, a Notary Public in and for the Province of British Columbia, Frederick Flindt, Commander of the Sailing Ship "SCHWARZENBEK," belonging to Hamburg, Germany, Fritz Unruh, Chief Office also of the same vessel, and

Wilhelm Kreyenhop, Sailmaker, also of the same vessel, who severally, duly and solemnly declare and state as follows:

THAT IS TO SAY,

That these appearers and the rest of the crew of the said vessel set sail from San Rosalia, Cal., for Royal Roads, British Columbia, in Ballast.

The vessel being then tight, staunch and strong, well-manned, victualled and sound, and in every respect fit to perform her said intended voyage.

On Tuesday, the 29th day of January last past, when the hour of nine o'clock in the morning tow-boat came alongside, vessel cast off from wharf, hove up port anchor, which was down, and proceeded; tow boat letting go hawser about 11 A. M. same date, and vessel continued voyage under sail, weather being favorable and all sail made.

Weather was now fine, with smooth set, and Rounds were now being regularly made and reported, Lookouts kept, and regulation light exhibits from sunset to sunrise.

An uneventful voyage was made from this date 29th January, vessel experiencing calsm, light winds, etc., until Saturday 1st day of March, last past, when at the hour of 7 o'clock P. M. vessel [184] made Flattery Light and stood in for entrance of Straits of San Juan, but wind being easterly and vessel beating, Callam Bay was not made until 7 A. M. of 2d of March. At that hour tug "Behada" spoke vessel, which was taken in tow and proceeded to Royal Roads where anchor was dropped at 5 P. M. 2d March.

Awaiting orders and discharging ballast vessel lay in Roads until 10th Marcy, 1907, when at the hour of midnight Tug "Lorne" same alongside, made fast and vessel proceeded to tow to Millside, Fraser River, having received orders from W. R. Grace & Co., San Francisco, the ship's charterers, by telegram to do so.

At 2 o'clock P. M. of March 11th vessel arrived at the wharf of The Fraser River Saw Mill, Ltd., and made fast, and having on the 13th day of March, 1907, discharged all ballast, and being prepared to receive cargo Captain notified Mill in writing that he was ready, he having fulfilled all conditions of Charter Party and also as per Charter Party supplied Mill with written Surveyor's certificate. This notice having been refused by the mill on the ground that ship was not ready Captain made note of same in his Log-Book, and went to Vancouver to interview charterers' stevedores, mentioned in Charter Party.

On Thursday March 21st, the Mill having accepted notice from Master that he was ready to receive cargo, vessel began loading, having on that date notified Mill that when cargo first came on board seven (7) of his lay days had expired; see Captain's letter book for copy.

Loading of vessel now proceeded until Friday 19th day of April, when vessel's lay days having run out Captain served written notice on Mill Manager and also telegraphed Grace & Co., Charterers, that his lay days had now expired, and that he was on demurrage. [185]

Loading continued until Wednesday 15th day of May, when at about noon vessel was loaded, having on board roughly 1,600,000 ft. B. M. of Lumber; and on that date and time Captain had a claim for demurrage amounting to £610/0/6, or \$2,964.72 at exch. \$4.86, which he served on Mill Manager at loading berth, as well as posting copy of registered letter to W. R. Grace & Co., Charterers, San Francisco. Charterers were also telegraphed to by Captain to the effect that he would only sign Bills of Lading under protest, until his claim for demurrage was paid or acknowledged in writing, it having been refused.

This appearer declares that on the 20th day of April, 1907, he appeared at the office of CHARLES GARDINER JOHNSON, the Notary Public, and causes his Protest to be duly noted.

Wherefore the said appearers on behalf of the owners of the said vessel and on behalf of themselves as Master, Mate and Sailmaker, do protest, and I the said Notary at their request do also protest against the said Charterers, and against their agents, and against all and every other person or persons whosoever responsible, or liable, or whom these presents do, shall or may concern, and holding them responsible and liable for the breach of said Charter Party and for all demurrage, damage, injury, loss, wages, costs and expenses incurred, owing or sustained or to be incurred or sustained by reason of the said *breach*, delay, detention, or other premises, and will

sign Bills of Lading only under Protest as herein mentioned.

FRIEDRICH FLINDT, Master.

[Seal]

FR. UNRUH, Chief Officer.

W. KREYENHOP, Sailmaker.

THUS DECLARED AND PROTESTED in due form of law at the office of me, the *daid* Notary, at Vancouver, B. C., the day and year first above written.

C. GARDINER JOHNSON,

Notary Public.

[Endorsed]: Filed June 9, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [186]

(Respondent's Exhibit "C.")

Rec'd Nov. 20, 1908.

Ans'd.

Ship "Schwarzenbek,"

Millside, May 21st, 1907.

Rec'd May 25, 1907.

Ans'd.

Ex.

Messrs. W. R. Grace & Co.,

San Francisco, Cal.

Dear Sirs:—

Under instructions from my owners I am to-day ready to sign Bills of Lading as you request, but only do so under Protest as I claim demurrage amounting to \$2,984.72, which you have declined to pay me or to settle with me about.

Herewith is a copy of Protest which I have made before a Notary for the reason that you have pre-

vented my signing Bills of Lading under protest.

I am,

Yours very truly,

FRIEDRICH FLINDT,

Master Ship "Schwarzenbek." [187]

Rec'd Nov. 20, 1908.

Ans'd.

May 21st, 1907.

Capt. Flindt,

Master "Schwarzenbek,"

In Stream, New Westminster, B. C.

My dear Captain:—

I was very much surprised to receive your protest, addressed to the Fraser River Sawmills, Limited, for a great many reasons, a few of which I will enumerate to you right now. In the first place you have erred in your statement as to when your lay days commenced. This we can prove to you from the date of your notice in your own handwriting. You fully understand that, where a strike occurs during the loading of a vessel, before the Vessel's lay days are up, the lay days during the lift of a strike cannot be counted against the Mill Company; further, you are aware of the fact that never during the time you were laying at our wharf were you out of lumber; the closest to it was when there was but 15000 ft. of regular cargo, and some 40,000 ft. of short-stowage ordered by you. Now, before a vessel can claim any demurrage, she must clean up the wharf day by day; according to the laws in such cases, a vessel does not have the privilege of leaving lumber on the wharf for several days, and then putting it all in in one day,

but, she must clean up the wharf each day, completely. Of course, in the case of short-stowage called for by you, this would not be expected, and was not by us, for the short stowage is to be used all thru the stowing of the cargo. As you, yourself, have said to me a number of times that you *new* you had no claim against the Mill Co. for demurrage, and your mate has made the same assertion to several of our mill men, it does seem rather strange to me that you should [188] have filed your protest

May 21/07.

Capt. Flindt,

Master "Schwarzenbek," in Stream,
New Westminster, B. C.

against *us*, when you knew, and so did Mr. Gardner Johnson well knew, that the protest was not worth his fees, and the paper it was written upon. We have a great deal of evidence that we might further state at this time, but it is not worth our while, for we are of the firm belief that you have done this, simply because you were told to do it, and could not use your own judgment in the matter at this time. There is no law in Canada, United States, nor Great Britain that could, or would, collect one cent from us, under the circumstances.

We trust that nothing further will come of this, as it will just mean the waste of good money for both your owners, and others interested.

Yours very truly,

FRASER RIVER SAYMILLS Limited,

W. P. FOWLE,

Manager.

WPF-J.

Fraser River Sawmills Lt.,

Millside, B. C.

Gentlemen:—This is an exact copy of letter received from you by me—on May 21st. Stm't. correct—

F. FLINDT.

J. W. BRITTON, Jr.,

Witness. 5/25/07. [189]

On this twentieth day of April in the year of our Lord one thousand nine hundred and seven personally appeared and presented himself at this office of CHARLES GARDINER JOHNSON, Notary Public in and for the Province of British Columbia, Frederick Flindt, Master of the Sailing Ship "Schwarzenbek," which sailed on a voyage from San Rosalia, Cal. via. Royal Roads, British Columbia, for orders on the twenty-ninth day of January from San Rosalia, and on the tenth day of March from Royal Roads for the Port of New Westminster, British Columbia, which was reached on Monday, the 11th March, at — o'clock — M.

And the said master hereby gives notice of his intention of protesting, and causes this note of minute to be made of all and singular the premises to be entered in this Register. His vessel having been detained over and above her lay days as set forth in Charter Party; and further protests against signing Bills of Lading as he has not been paid demurrage from day to day from and including Saturday the 20th day of April, 1907, up to and including Wednesday the 15th day of May, 1907; see attached Marked

“A” in red ink, and Extended Protest.

Sgd. F. FLINDT,
Master S. “Schwarzenbek.”

[Seal]

Sgd. C. GARDINER JOHNSON,
Notary Public.

1, Charles Gardiner Johnson, hereby certify the foregoing to be a true and correct copy of the original Note of Protest, which is now on file in my office.

[Seal] C. GARDINER JOHNSON,
Notary Public. [190]

“A”

CGJ.

N.P.

German Ship “Schwarzenbek,”
New Westminster, B. C.

Messrs. W. R. Grace & Co.,
San Francisco, Cal.

(Charterers German Ship “Schwarzenbek.”)

To German Ship “Schwarzenbek” & Owners.

To demurrage on vessel from 20th day of

April, 1907, to 15th day of May, 1907

Inclusive, 26 days @ 3d per registered tonnage per day (1877 tons)=

£610:0:6 @ exch. \$4.86=\$2,964.72

Dated at New Westminster, B. C., 17th May, 1907.

F. FLINDT,

“A”

Master.

F. UNRUH.

W. KREYENHOP.

[Endorsed]: Filed, June 9, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [191]

(Respondent's Exhibit "D.")

April 2d, 1907.

Capt. F. Flindt,
Master "Schwarzenbek,"
Millside, B. C.

My dear Sir:—

I am in receipt of yours dated April 1st, and note your plaint as to your quarrel with the stevedores and charterers. This is nothing to us. We are cutting the lumber as per instructions from Messrs. W. R. Grace & Co., and have no authority from them to change the lengths to suit your convenience. Of course, you understand that, so long as the ship is alongside the Dock, and not loading, during this controversy, the lay-days are against you, and will not be taken into consideration when counting same. These troubles you must fix up with Grace & Company's Agent, who informed us yesterday they had telegraphed to you regarding same.

Yours very truly,
FRASER RIVER SAWMILLS, LIMITED,
By W. P. FOWLE,
Manager.

WPF—J.

This is Exhibit "A" referred to in the affidavit of William P. Fowle, sworn before me this 10th day of June, 1907.

A. J. BOWERS,
A Notary Public within British Columbia.

[Endorsed]: Filed, June 9, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [192]

(Respondent's Exhibit "E")

A.

Ship "Schwarzenbek,"

Vancouver, B. C., March 19th, 1907.

Capt. C. W. Rennie,

Vancouver.

Dear Sir:—

With reference to the stevedoring of my vessel—
Under clause 68 of her Charter Party it reads that the
cargo is to be stowed under the master's supervision
and direction, charterers stevedore to be employed
not exceeding \$1.10. On my arrival at Millside I
notified charterers, Messrs. W. R. Grace & Co., of
San Francisco, who advised me that Bartlett of Port
Townsend, would stevedore as per Charter. I wired
this gentleman, who in turn wired me, under date
15th inst. that you would load ship for him. Up to
the time of writing nothing has been done towards
stevedoring my vessel; I have been at my loading
berth ready to receive cargo since the 12th inst. and
I shall be obliged if you will advise me by return
whether you intend to stevedore the vessel; if so,
please stated date on which you intend to start work;
if not, I shall have to make other arrangements
charging the charterers with all expenses I may have
to go to.

Please give messenger reply to this by return, and oblige

Yours very truly,
Sgd. F. FLINDT,
Master.

For true copy.

KNOHR & BURCHAR, Nfg.
3794/08.

[Endorsed]: Filed June 9, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [193]

*In the District Court of the United States, for the
Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

Order Concerning Exhibits in District Court.

It appearing to the Court that libelants' exhibit one in the above-entitled case consists of a map or chart, and that libelants' exhibit seven consists of two documents written in the Spanish language,

NOW, THEREFORE, IT IS HEREBY ORDERED that said libelants' exhibit one may be filed in its original form in the Circuit Court of Appeals by the clerk of the District Court, and that said documents constituting libelants' exhibit seven shall

be translated from the Spanish language into the English language by Jose de Rocco, and such translations, together with the originals of said documents, may be filed in the Circuit Court of Appeals by the clerk of the District Court.

Dated: San Francisco, California, February 14, 1916.

M. T. DOOLING,
Judge of said Court.

[Endorsed]: Filed Feb. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [194]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Order Extending Time [to December 13, 1915, for
Preparation of Apostles on Appeal.**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED:

That the appellants herein have to and including the 13th day of December, 1915, within which time to procure to be filed the apostles on appeal certified by the clerk of the District Court, and that the clerk of the District Court have to and including said day

within which time to certify such apostles.

Dated: November 12, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed, Nov. 12, 1915. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [195]

*In the District Court of the United States, for the
the Northern District of California.*

No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Order Extending Time [to January 14, 1916], for
Preparation of Apostles on Appeal,**

Good cause appearing therefor, it is hereby ordered that the time within which the appellants and the clerk of the above-entitled court are to file the apostles on appeal herein, in the Circuit Court of Appeals, be, and the same is extended to and including the 14th day of January, 1916.

Dated: San Francisco, California, December 14, 1915.

M. T. DOOLING,
Judge of said Court.

[Endorsed]: Filed Dec. 14, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [196]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Order Extending Time [to February 14, 1916] for
Preparation of Apostles on Appeal.**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED:

That the appellants herein have to and including
the 14th day of February, 1916, within which time to
procure to be filed the apostles on appeal certified by
the clerk of the District Court, and that the clerk
of the District Court have to and including said day
within which time to certify such apostles.

Dated: January 11, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed, Jan. 11, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [197]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 13,980.

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Libelants,

vs.

W. R. GRACE & CO., a Corporation,

Respondent.

**Order Extending Time [to February 24, 1916] for
Preparation of Apostles on Appeal.**

Good cause appearing therefor, IT IS HEREBY ORDERED; That the appellants herein have to and including the 24th day of February, 1916, within which time to procure to be filed the apostles on appeal certified by the clerk of the District Court, and that the clerk of the District Court have to and including said day within which time to certify such apostles.

Dated, February 14th, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Feb. 14, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [198]

**Certificate of Clerk, United States District Court,
to Apostles on Appeal.**

I, Walter B. Maling, Clerk of the District Court of
the United States of America for the Northern Dis-

trict of California, do hereby certify that the foregoing 198 pages, numbered from 1 to 198, inclusive, contain a full true and correct transcript of certain records and proceedings, in the case of Martin H. A. Elvers et al., vs. W. R. Grace & Company, a corporation, No. 13,980, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "Praeceptum for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of Golden W. Bell, Esquire, Attorney for Libelants and Appellants herein. Libelants' Exhibits "1" and "7" are transmitted herewith, in their original form, in accordance with order of this Court, dated February 14th, 1916.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Eighty-seven Dollars and Ten Cents (\$87.10) and that the same has been paid to me by the attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of February, 1916.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

TMC.

[Ten Cent Internal Revenue Stamp. Canceled
2/24/16. C. W. C.] [199]

[Endorsed]: No. 2750. United States Circuit Court of Appeals for the Ninth Circuit. Martin H. A. Elvers and Frederick A. E. Zimmer, Appellants, vs. W. R. Grace & Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed February 24, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**Certificate of Clerk, U. S. District Court, as to
Original Exhibits.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the annexed exhibits, Two (2) in number, being marked:

Libelants' Exhibit "1" (Chart or map),

Libelants' Exhibit "7" (Powers of attorney),
are original exhibits, introduced and filed in the case of Martin H. A. Elvers et al. vs. W. R. Grace & Company, a Corp., No. 13980, and are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit, as per order of this Court, a copy of which is embodied in the apostles on appeal herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of February, A. D. 1916.

[Seal]

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

CMT

[Ten Cent Internal Revenue Stamp. Canceled 2/24/16. C. W. C.]

[Endorsed]: No. 2750. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk, U. S. District Court Re Exhibits. Filed Feb. 24, 1916. F. D. Monekton, Clerk.

No. 2750

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Appellants,

VS.

W. R. GRACE & COMPANY (a corporation),
Appellee.

BRIEF FOR APPELLANTS.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
GOLDEN W. BELL,
Proctors for Appellants.

Filed this.....*day of October, 1916.*

Filed

OCT 9 - 1916

F. D. Monckton

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARTIN H. A. ELVERS and FREDERICK A. E.
ZIMMER,

Appellants,

VS.

W. R. GRACE & COMPANY (a corporation),
Appellee.

BRIEF FOR APPELLANTS.

Introductory.

This is a case of damages in the nature of demurrage incurred by a foreign shipowner, under a charter of his vessel to W. R. Grace & Co. of San Francisco, under which the vessel was to be loaded on Puget Sound or in British Columbia. The facts show that, after the foreign vessel arrived at the port of call of Royal Roads, Vancouver Island, the charterer, instead of directing her to a loading port, where she was to take the charterer's cargo of lumber on board within the period stipulated in the charter-party, kept her waiting at the port of

call, thereby causing a wrongful detention of the ship, and that later, when the vessel finally reached her loading mill, the charterer failed to send his stevedore there (whom it was the charterer's right and duty to appoint under the charter-party), which contributed further to her detention beyond the time allowed the charterer by the charter-party. From the evidence the court will have no difficulty in finding that, even after the vessel commenced loading, the mill had not sufficient cargo ready and was compelled to spar for time; that the mill, to promote its own interests, took advantage of the foreign master's unfamiliarity with the localities on Puget Sound, and with the language; and that the case before the court is a clear and, indeed, aggravated case of sacrificing the time of the ship in order to serve the interest of the shipper. It is a flagrant case of playing fast and loose with helpless shipowners who were thousands of miles away and not in a position to protect themselves. There is no conceivable defense in justice or equity under the facts. Respondent has, however, introduced the technical defense of the cesser clause. This defense was first introduced by exceptions to the original libel, which exceptions were in due course overruled by His Honor, Judge De Haven (Apostles, p. 21). Later, at the trial, respondents again took advantage of the same technical defense before His Honor, Judge Dooling, who overruled Judge De Haven's decision and sustained the exceptions, apparently with reluctance (p. 133). It is submitted

that, in the construction of the cesser clause, libelants are entitled to the benefit of every doubt in view of the aggravated injustice which would result from the present decision.

The principal question on this appeal is the question of law, whether the cesser clause in this case constitutes a defense to libelants' action, one judge below having answered this question in the negative, the other in the affirmative. After this question is once decided in favor of libelants' contention, it matters little whether the case is remanded for final judgment on the facts to the lower court, or whether it is finally decided by the court on this appeal; but we submit most earnestly that the record before this court shows with conclusive fullness that libelants are in law and justice entitled to a decree for the full amount of their damages, and that this court is in a position to render such a decree without remanding the cause to the lower court for further action.

Statement of the Facts.

1. On August 16, 1906, libelants, the owners of the steel ship "Schwarzenbek", chartered the ship to respondent. The charter-party provided for a voyage with a full cargo of lumber from a mill or loading place on Puget Sound, or in British Columbia not north of Burrard's Inlet, as might be directed by charterers, to Callao direct. It was also

provided that the charterer should give orders as to the mill where the cargo was to be loaded *within forty-eight hours* (Sundays and legal holidays excepted) *after the charterer had received notice of the arrival of the vessel* at Port Angeles, Port Townsend, or Royal Roads, "*failing which lay days to count.*"

It was further provided that thirty working lay days should be allowed respondent for loading the vessel, and that said lay days were to commence twenty-four hours after the vessel should be at the loading place satisfactory to the charterer, inward cargo and necessary ballast discharged and ready to receive cargo, the master having given written notice to that effect. It was further provided that the charterer's stevedore should be employed, although the cargo was to be stowed under the master's supervision and direction.

It was further agreed that discharge should be given with dispatch according to the custom of the port of discharge, and that for every day's detention by the fault of the charterer the latter should pay demurrage at the rate of 3d sterling per register ton per day.

2. On March 2, 1917, the vessel arrived at Royal Roads. Not finding any orders as to loading mill, the master wired to respondent on the same day for such orders. This wire, in the ordinary course, should have been received earlier, but is admitted to have been received by respondent on March 4th,

at 4:30 P.M. *No orders or instructions of any nature whatever as to loading mill were given by charterer within forty-eight hours thereafter.* Finally on March 6th, at 5:45 P.M., respondent wired: "We will load your ship Millside." Not knowing to which millside to proceed (p. 179), (there being numberless millside on Puget Sound, or in British Columbia not north of Burrard's Inlet), the master sent another wire, and, on March 7th, received the laconic answer: "Millside, Fraser River." The distance from Royal Roads to the millside designated is over 120 miles (p. 98); the "Schwarzenbek" proceeded there in tow and arrived at the loading mill on March 11th, at 2 P.M.

3. On March 13th, at 11 A.M., the vessel's inward cargo and necessary ballast were completely discharged (pp. 180, 176); she was ready to receive her cargo, and her master gave his notice of readiness to load (p. 180). The duty of loading the cargo rested upon Fraser River Sawmills, Limited, a corporation (deposition of A. J. Stewart, p. 93; also p. 184). On arrival at the mill the master found no stevedores there, although he was by his contract obliged to employ the charterer's stevedores for loading; he therefore wired to respondent on March 11th, asking respondent to nominate its stevedore. Respondent replied, on March 12: "Bartlett Stevedore." To a stranger in these regions this was, of course, not very illuminating; the master therefore was obliged to ask again for instructions, and on March 12th received the wire:

“As wired this morning Bartlett Port Townsend will stevedore per charter” (p. 185). As Port Townsend was over 100 miles from the loading place, and no Bartlett made his appearance, the master, on March 13th, wired to respondent: “Now Millside three days still awaiting stevedore. Will hold you liable all expense and delay”; and on the same day he wired to Bartlett, at Port Townsend: “Ready but no stevedore here yet. Advise” (pp. 189-190). In answer to the telegram to respondent, the latter wired, on March 14th: “Communicate with Bartlett. We are not concerned in arrangements beyond nominate responsible stevedore who will load according to charter.” Stevedore Bartlett never did appear; but on March 15th, he wired to the Captain: “Capt. E. W. Renny will load your ship for us.” Renny turned out to be a stevedore at Vancouver, B. C., a place only about 17 miles from the loading mill, but, during the following three days, neither Bartlett nor Renny, nor any other stevedore, made his appearance at the mill. Therefore, on March 18th, the master wired again to respondent: “Still waiting stevedore;” and, on March 19th, he wrote to Capt. C. W. Renny, at Vancouver, asking him whether he intended to stevedore the vessel, and notifying him that, if he did not intend to do so, he would have to make other arrangements (Respondent’s Exhibit E, Apostles, p. 223). At last, on March 21st, Capt. Renny and his stevedores arrived and, on that day, put up the loading gear. The loading of the cargo commenced on the following day, March 22nd.

4. If the lay days, as provided in the charter-party, commence to count on March 7th, while the ship was waiting for directions at the port of call, she would have been completely loaded, under her allowance of thirty working lay days, on April 12th. Under this calculation the unwarranted detention of the vessel, for which respondent is responsible under the charter-party, extended from April 13th to May 15th, when the loading was completed, being a period of 33 days ship's time unlawfully used by the charterer.

If, however, the lay days are counted from March 14th, when the ship was at the port of loading and actually ready to load, she would have been completely loaded, under her allowance of thirty working lay days, on April 19th. Under this calculation the period of detention extended from April 20th, to May 15th, or 26 days.

In fact the ship was not completely loaded until May 15th, as the work of loading, after the stevedores had finally commenced their work, was interrupted by a stevedore's strike, which began on April 23d, and ended on May 11th.

5. The evidence shows that the detention of the ship, first at the port of call, where she was waiting for respondent to name her loading mill, and later at the loading mill, where she was waiting for respondent to send charterer's stevedore, was in fact due to the fault of the loading mill, the shipper of the cargo, rather than to the fault of the charterer. Under the contract of charter-party libellant's deal-

ings were, of course, to be carried on with the charterer alone, and the inside facts which might throw interesting side lights on this case and would account for the unconscionable waste of the ship's time, are within the exclusive knowledge of the millowners, the real defendants of this case, who have carefully refrained from disclosing them. In spite of libelants' numerous demands for copies of the correspondence with the mill, only few documents found their way into the record. But some significant facts *are* disclosed by the record, from which it is proper to infer other pertinent facts. The testimony of the master shows that the cargo was not ready when the ship arrived at the loading mill (p. 181). The reports of H. D. Hylton, respondent's agent at the mill, who superintended the loading of the cargo, show that the loading was retarded and sometimes suspended by reason of the fact that the mill could not furnish enough lumber to the ship. On April 11th, he writes to W. R. Grace & Co.: "I do not believe that the mill will be able to cut enough to keep up with the loading as they are working on several other orders" (App. p. 193). An April 13th, he reports: "We worked ship only one hour today as we ran out of lumber this morning. * * * The mill has not cut very much for us today as their merchantable logs have not yet arrived. Expect to begin work again Monday morning" (pp. 193, 194). On April 20th, he writes: "Have only worked about 36 hours this week as mill has not been able to cut lumber but

they did better last of the week as were in better logs" (App. p. 195). Again, on April 24th, he reports: "We have loaded no lumber on ship 'Schwarzenbek' this week as the mill did not have much ahead on Monday morning and the stevedore worked men on steamer 'Georgia'" (App. pp. 195, 196). From these excerpts of reports of the loading, made to charterer by its agent, it appears that the loading mill was not ready with the cargo and was responsible for the detention of the ship. The affidavits of William P. Fowle, Manager of the Fraser River Sawmills, improperly in the record (pp. 68 and 71) show the subterfuges by which the mill attempted to "stall" the loading.

Very significant in this connection is the deposition of A. J. Stewart, taken on behalf of respondent. He was foreman of the mill at the time when the ship was loaded (p. 93) and looked after the "cutting of the lumber for her". It could certainly be expected that respondent would show by *his* testimony that the "Schwarzenbek's" cargo was ready for her when she arrived at the loading mill. But there is not one word in his testimony to show that any cargo was ready for her before March 21st. He states in answer to the question: "What was the first day on which the mill had sufficient lumber ready for loading the said ship?" (Interrog. 19, p. 115), that "The mill was ready to deliver whenever the ship was ready" (p. 100), and as the ship, *according to his distorted notion*, was ready on "21st March, 1907", the plain inference is that the

first day on which the mill had sufficient lumber ready was March 21st. This testimony on the part of the man who was charged with furnishing the cargo accounts for the *reason* why, when the ship arrived at Royal Roads, the loading mill was not disclosed to her master, and why, after the vessel arrived at her loading place, on March 11th, she was kept waiting for the stevedores until March 21st.

The real facts with reference to the loading are in the exclusive possession of the parties who loaded the ship; but the evidence, so sparingly disclosed by our real opponents, shows plainly that this is an action against W. R. Grace & Co. only pro forma, and that the real party defendant in interest, as responsible for the detention which caused the damages to libelants, is the mill company which loaded the cargo. In reality the liability involved in this action is not a charterer's liability at all, but the liability of a third party with whom libelants had no contract. It is proper for the court to weigh this fact in the balance, and to consider that cesser clauses in charter-parties are intended to protect charterers, and not wrongdoers who hide behind the skirts of the charterers.

The Two Decisions of the Lower Court on the Effect of the Cesser Clause.

1. The libel was filed on February 18, 1909. On March 10, 1909, respondent filed exceptions to the

libel, contending that the libel did not state a cause of action against respondent, by reason of the cesser clause in the charter-party (p. 20). After hearing argument on October 16, 1909, and upon due consideration by the court, the court, by the Honorable John J. De Haven, Judge, overruled these exceptions on November 17, 1909, and respondent was allowed ten days to answer the libel (pp. 2, 3, 21).

2. The hearing of the case in the lower court took place on June 9, 1914. After the testimony was presented, libelants, at the close of the trial, moved the court to amend the libel to conform to the proofs made at the trial, which motion was granted. The amended libel was filed on June 11, 1914. On July 1, 1914, exceptions to the amended libel were filed, on precisely the same grounds as the exceptions to the original libel, and raising the same issue of the cesser clause (p. 127). Thereafter, on May 17, 1915, the lower court made an order sustaining the exceptions to the amended libel (p. 137), and on June 3, 1915, a decree was entered sustaining the said exceptions and dismissing the amended libel (p. 147).

In its opinion the lower court said:

“As the libel is against the charterers in personam, exceptions have been filed to it, on the ground that it states no cause of action against respondents, the charterers, *because of the cesser clause in the charter*, but that libelants’ only remedy is an action in rem against the cargo. *The action was, however, fully tried*, and these

exceptions are taken to an amended libel filed at or about the close of the trial. Similar exceptions taken to the original libel were overruled by the former judge of this court. The high regard which I have for the late Judge De Haven's learning has caused me to hesitate long before deciding that the exceptions to the amended libel are well taken. But a careful study of the English and American cases in which the effect of so-called cesser-clauses has been passed upon has led me to the conclusion that under the provisions of this charter the cesser clause is effective."

Here, then, we have two divergent views and opposite rulings by two judges of the lower court on a pure question of law. We contend that the "cesser clause" in this case does not bar libelants' action against the respondent. If the court is with us on this issue of law, we feel absolutely certain that on the merits the case will be decided in libelants' favor, whether the final decision be rendered in this court, or the cause be remanded to the lower court for further action; for there never was a case where justice demanded more loudly redress for a commercial injury.

In taking this question into consideration we request the court to give proper weight also to the fact that the *reason* for the presence or application of a cesser clause is entirely absent in this case, even if the fact that the guilty party is one standing behind the back of respondent were left out of consideration. The charter was made on the printed form of charter-parties of W. R. Grace & Co. In

many transactions of a mercantile firm such a clause is of great value; but it is not intended, even as between shipowner and charterer, for transactions such as the one disclosed by the evidence. The presumed purpose of the cesser clause is, as stated by Judge Brown in *Burrill v. Crossman*, 65 Fed. 104, 106,

“to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports. * * *”

In this case the respondent was not only the charterer of the ship, but also the consignee of the ship at the port of discharge, besides being the consignee of the cargo under the bill of lading, and having a branch house in the distant port of discharge, and therefore being more at home there than at the port of loading. Respondent controlled both the loading and the discharging of the vessel. As consignee of the ship at Callao, respondent bore, for a commission, all the responsibilities of the discharge of the cargo; not only had respondent no desire to relieve itself from such responsibilities, but found it attractive, for commercial reasons, to burden itself with the responsibilities attending the discharge of the cargo in the distant port. And as consignee of the cargo, respondent had a special interest in having the cargo discharged and taking it into its own possession.

Libelants' Points and Authorities.

I. PRINCIPLES OF CONSTRUCTION OF THE CESSER CLAUSE.

1. "A clause known as the 'cesser clause' is sometimes inserted in the charter-party. It usually provides that the charterer's responsibility shall cease when the vessel is loaded *and bills of lading are signed*, and although this clause will ordinarily be given effect and exempt the charterer from responsibility for delay occurring subsequent to loading, but not before, it is always subject to and controlled by the other provisions of the charter-party and bill of lading."

36 Cyc. 352.

2. The charter-party in this case, after providing for the loading and discharging of the cargo, contains a cesser clause which reads as follows:

"Vessel to have à lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine *as soon as the cargo is on board*; all questions, whether of demurrage or otherwise to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

The language that the "liability of the charterers shall cease and determine as soon as the cargo is on board" is ambiguous. It may be that the charterer was to be entirely exonerated, as soon as the cargo was loaded, both as to past breaches of contract, and as to future possible breaches; or it may be that, whereas he would have been liable for breaches of contract prior to the loading, yet, as soon as the

cargo was on board, the shipowner should look to the consignee with respect to all things touching the completion of the contract, and not to the charterer. Which of the two meanings is the more probable? The shipowner could know nothing of the consignees at Callao; not until after the cargo was loaded and the bills of lading signed would he know them to be persons of substance, possessing valuable property on board his vessel; but he would, nevertheless, be under practically insuperable difficulty in proving his case against unknown persons in Callao in respect of delay occasioned to his ship while in Puget Sound, and would be obliged to sue them in a foreign court where his lien might be of no substantial value. The words used in the cesser clause are certainly not clear enough to relieve respondent as charterer from *liability incurred before any cargo was on board*, much less from liability for damage caused to the ship before a loading place is named; hence the principle applies that, "when parties mean to get rid of liability they should take care to use *clear and unmistakable language*, and should put into their agreement words as clear as those in the case of *Oglesby v. Yglesias* (Blackburn, J., in *Christoffersen v. Hansen*, 1 Asp. 308)." In the *Oglesby* case it was expressly stipulated that the liability should cease "as to all matters and things *as well before as after the shipping of the cargo*". In the absence of such words the ambiguity should be resolved against the party seeking to get rid of liability for wrongful

acts. If it be argued that the language "all and any liability of the charterers under this agreement shall cease and determine" is broad enough to include such liability as is the subject matter of this suit, we call the attention of the court to the answer of Blackburn, J., to a similar argument in the *Christoffersen* case above cited. When counsel in that case argued that "liability" as well before as after (the loading) cannot mean more than 'all liability', Blackburn, J., answered: "But on the other hand 'all liability' may mean something less".

Furthermore it is to be noted that the words "all and any liability of the charterers" refer to liability connected with "freight, dead freight, and demurrage" and consequently to liability connected with cargo, and not to liability for damages caused by failure to designate a loading port.

3. The cesser clause in a charter-party must be strictly construed against the charterer (*Hughes, Admiralty*, p. 165; *Compania La Flecha v. Brauer*, 168 U. S. 104, 118).

In

Clink v. Radford (1891), 1 Q. B. 627,

Lord Esher said:

"The main rule as to the interpretation of the cesser clause in a charter-party which I gather on looking at the cases is that, unless the cesser clause is expressed in terms so clear that it cannot be got rid of, the court will always be inclined to construe it so as not to apply to the particular breach complained of, *if by so doing the owner is left unprotected against every one else*. In other words, it cannot be assumed that

the owner would by the cesser clause give up, without any mercantile reason at all, rights stipulated for in the contract. If that be true, then the matter * * * depends on whether, if the cesser clause be applied to the particular breach complained of so as to free the charterer, we can find *that with regard to this particular breach the owner has a remedy for his loss against some one else*. If this is so, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if it is found that by so construing it, the owner would be left without any remedy against any one else, then we must say that the cesser clause could not have been intended to apply to such a breach."

If the decree of the lower court stands, the cesser clause in respondent's charter-party protects respondent from liability for its breach of contract, and the innocent shipowners are left without any remedy for their loss.

We ask the court to interpret this technical clause in the spirit of Lord Esher's remarks, which leads to the juster result of leaving the wrongdoer responsible for the loss deliberately inflicted upon the shipowner.

Lord Esher's rule of construction is approved in *Schmidt v. Keyser*, 88 Fed. 799, 800, on appeal before the Circuit Court of Appeals of the Fifth Circuit.

This court, in *Dewar v. Mowinckel*, 179 Fed. 355, adopted the rule that

"the cesser clause is to be construed, *if possible, as inapplicable to a liability with which the lien is not commensurate*",

a rule now settled since the decision of the Supreme Court in *Crossman v. Burrill*, 179 U. S. 100.

The rule is summarized by the Supreme Court in the following words:

“In a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate” (p. 108).

We shall show that the “lien on cargo for demurrage”, in this case, is not commensurate with the liability on which the suit is based, and that, consequently, the cesser clause is inapplicable to this case. The following principle of construction applies:

“Where a merchant seeks to use an ambiguous cesser clause in an oppressive manner, for instance when he requires the master and shipowner to settle in some distant place a dispute which could be better settled when and where it arises; or offers an illusory lien to replace what is taken away by the cesser clause, the fair and reasonable intention of the parties, which is to be presumed, may probably be better carried out by giving a *strict construction* to the cesser clause.”

Abbott, Merchant Shipping, 14th ed., p. 451.

In the case at bar respondent required the German master and shipowner to settle at Callao a dispute which can certainly be better settled in an American court. It may also be conclusively presumed that a lien to be enforced by a German master

in a Peruvian court is an illusory substitute for a claim against an American firm to be decided by a court of its domicile.

4. The object of the cesser clause in a charter-party is to define the point of time when the liability of the charterer is to terminate, and the liability of the consignee of the cargo to commence. The latter liability is substituted for the former. The clause is, therefore, predicated upon the bill of lading between the charterer and the consignee of the cargo, and is intended to apply only to cases where charterer and consignee are distinct persons. The intention is that the charterer shall not continue responsible for the performance of the charter-party after he has provided the agreed cargo, but that the shipowner shall have his remedies under the bills of lading only, and against the consignee of the cargo (*Carver*, Sec. 645).

The intention to draw a dividing line between the liability of the charterer and that of the consignees appears with unusual clearness in the form of the cesser clause used in the charter-party in suit; for it is there expressly agreed that "all questions, whether of demurrage or otherwise," are "to be settled with the *consignees*", the liability of the charterers having ceased. Such an agreement, obviously, was not intended to have, nor does it have, any application to a case like the one at bar, where there is no distinct consignee, but where charterer and consignee are the same person.

5. For another reason the clause was not intended to be invoked in a case like the one at bar. The purpose of the cesser clause is to protect a charterer who, in making the charter-party, acted as local agent for a foreign principal, and who, after he has placed the cargo on board, wishes to wash his hands of the whole transaction and to relegate the shipowner to the principals for whom he shipped the cargo (*Scrutton, Charter-parties*, p. 14).

“A merchant who deals in commodities which are commonly sold in entire cargoes while they are afloat may find it worth while to take a comparatively small profit or commission on a large transaction, if he can limit his responsibility to such part of the transaction as *he can control personally*, which is generally the loading.”

Abbott, 14th ed., p. 448.

Judge Brown, in *Burrill v. Crossmann*, 65 Fed. 106, states the “presumed purpose” of the cesser clause to be “to relieve the charterer from the *responsibilities attending a discharge of cargo to purchasers in distant ports*”.

In the present case, respondent was charterer of the ship, consignee of the ship at the port of discharge (charter-party, cl. 89), and consignee of the cargo (libel, art. VI, not denied); the bill of lading was forwarded to the branch house of respondent at Callao (p. 65), and respondent, by its agent at Callao, had control of the discharge of the cargo. Respondent had personal control of the whole transaction from the time when the ship arrived at

Royal Roads until the time when she was finally discharged at Callao; granting, therefore, that respondent's responsibility should be limited to such part of the transaction as it could control personally, such a limitation would maintain and continue its responsibility throughout the whole transaction involved in this cause, and far beyond the time when the cargo was on board. Respondent was not a local agent for a foreign principal in loading the ship, but had assumed the responsibilities attending the discharge of the cargo at Callao. The provision of the charter-party "that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board", if invoked by respondent, is in conflict with the duties voluntarily assumed in its contract and imposed by law upon the respondent as consignee of the ship, owner of the cargo and holder of the bill of lading. Even if a lien had been filed against the cargo by the master at Callao, the ultimate liability for its enforcement would have fallen on respondent. The personal liability of respondent under the charter-party could not, by valid agreement, be cut off "as soon as the cargo is on board"; such an agreement would in effect be an ouster of jurisdiction, and as such against public policy (*Carver*, p. 856).

II. THE PARTICULAR CESSER CLAUSE DOES NOT RELIEVE RESPONDENT.

A. Because It Does Not Apply to a Liability Accruing Before the Loading of the Cargo.

(a) By *strict* construction the charter-party provision for “demurrage”, referred to in the cesser clause, applies only to *discharge* of the cargo.

The clause gives the vessel a “lien on cargo for demurrage” (p. 16), and “demurrage” is defined in the following connection:

“*Discharge* to be given with dispatch according to the custom of the port of discharge at such safe wharf, dock or place as charterers may direct, but at not less than 35,000 feet B.M. per day. For each and every day’s detention by the fault of party of the second part or agent, they agree to pay to the said party of the first part, *demurrage* at the rate of three pence sterling per register ton per day” (pp. 14-15).

From such construction it would follow that it was the intent of the cesser clause to relieve the charterers only from demurrage at the port of Callao, the discharging port. Such intention would be in consonance with fair business convenience, as it is to be presumed that the charterer, in an ordinary case, prefers to end his liability as charterer after he has loaded his cargo. This would be in consonance with the rule stated in *36 Cyc.*, 352, as follows:

“This clause will ordinarily be given effect and exempt the charterer from responsibility for delay occurring subsequent to loading (cit-

ing authorities in note 35) *but not before*” (authorities in note 36).

(b) Assuming the demurrage clause to apply to cases of detention in *loading as well as discharging*, nevertheless the cesser clause does not apply to the case at bar, because this is not a case of demurrage either in loading or in discharging. The libellant sues respondent for wrongs done to his ship *before the loading commenced*. The charterer's liability arises in the first place from the deliberate waste of the ship's time in detaining her at Royal Roads and failing to declare the loading mill and to send the ship to a place where the cargo was to be put aboard. The injury to the ship, and corresponding liability of respondent, were aggravated by the waste of the ship's time resulting from the failure to send the charterer's stevedore to the place of loading. Neither of these liabilities arises from “demurrage” within the definition of the charter-party. As above contended, a strict construction of this instrument confines the subject of demurrage to *discharge* of the cargo. If a wider construction be adopted, delay in loading could be included among the cases for which demurrage is provided; but no proper construction could extend the application of the agreed demurrage to any torts or breaches of contract occurring at periods not connected with either the loading or discharging of the cargo. By the charter-party the earliest point of time when ship and cargo came into contractual relations with one another is defined as

“twenty-four hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo, Master having given written notice to that effect” (charter-party, cl. 52).

The point of time thus defined occurred on Wednesday, March 13th, at 12 noon, after the master had given the required notice; hence, even if “demurrage” be extended to apply to loading, it could not be fairly be applied to a period before the beginning of the lay days, or to anything happening before noon of May 13th.

The cesser clause has no force as applied to charterer's liabilities accruing at a time when the ship was uncertain as to whether she would ever receive a cargo; for the charterer has no right to substitute for his liability a lien upon a future, prospective and merely contingent cargo which, as far as the shipowner's position on March 4th was concerned, might never be loaded. When, on March 4, 1907, at 4 P.M., the master of the “Schwarzenbek” had given actual notice to charterers that his vessel had arrived at Royal Roads; when 48 hours had elapsed after this notification, yet the ship had received no orders as to loading mill, the contingent liability of respondent was fixed. The charterer was then under obligation either to furnish a full cargo before April 13th, or, if the vessel should be detained in any loading port beyond April 12, 1907, to pay demurrage day after day from and after April 13, 1907. This liability had no connection

with a cargo which might or might not be in existence ready for the ship in some other port, least of all a port unknown to the owner of the ship. No valid lien could be given to the master or owner upon any cargo without turning the actual possession over to him; it is absurd to attempt to convey a lien, as a substitute for an accrued liability, upon a cargo which the charterer is hiding in an unknown port. The "lien upon cargo" provided for in the cesser clause offered as a substitute for the "liability of the charterers under this agreement" can only apply to cargo in the possession of the ship when the liability arises, and not to a cargo which the charterer has merely agreed to prepare and load in the future. In this case no cargo was in the possession of the ship when the liability arose; there would have been no connection between this ship and a supposititious cargo waiting to be loaded in her in a known but distant port; a fortiori there was no connection between this ship and a ready cargo in an unknown port, and least of all any connection with a merely potential cargo in a potential port.

(c) Assuming the cesser clause to be construed as intended to include demurrage incurred *in loading*, it would be nevertheless ineffective, because there is *no consideration for the cesser agreement*. The cesser clause is inserted in consideration of the granting to the shipowner of a lien, *which he would not otherwise possess*, on the cargo for de-

murrage (*Scrutton, Charter-parties*, p. 141). A lien which the shipowner already possesses, either by previous agreement or in point of law, cannot form the basis of an agreement to surrender his rights. In this case the words: "Vessel to have a lien on cargo for all freight, dead freight and demurrage" convey nothing that the shipowner would not possess in the absence of such a clause.

"The clause giving a lien for freight and demurrage adds nothing, because that lien *exists by the maritime law of this country without any stipulation.*"

Davis v. Smokeless Fuel Co., 196 Fed. 753
(C. C. A. 2nd Circ.).

There being no consideration for the agreement that the charterer's liability should cease, the agreement is not binding. A cesser agreement affecting *accrued rights* is good in England, where the legal force of the lien granted to the shipowner depends solely upon the agreement of the charterer; but in the United States "it is well settled that the vessel owner has a maritime lien on the cargo of a person responsible for a detention, enforceable in admiralty, regardless of the existence or non-existence of an express contract for a lien" 36 *Cyc.*, 371). A legal right is not a sufficient consideration to support a contract; hence the agreement that the liability of the charterer shall cease is not binding, being without consideration.

**B. Because the Lien Given by the Cesser Clause
Is Not Commensurate with the Charterer's
Liability.**

It is settled that the cesser of the charterer's liability is co-extensive with the lien given in the charter-party to the shipowners; in other words, the charterer is released from those liabilities only for which a lien is given to the shipowner.

In the case at bar no commensurate lien was given to libelants by the charter-party, for the following reasons:

- (a) *The cesser clause in suit leaves it within the power of the charterer to make the agreed lien valueless by the subsequent act of the charterer.*

The clause provides that all liability of the charterers shall cease "*as soon as the cargo is on board.*" If, as soon as the cargo is on board, the shipowner is given a valuable lien enforceable at the place of delivery against the consignee, the cesser operates by law; if, on the other hand, the agreed lien has a string to it and may, at the option of the charterer, be defeated, the corresponding cesser or liability has nothing to support it and is not binding on the shipowner. What is the situation of the parties to such an agreement as soon as the cargo is on board? On the one hand from this moment all and any liability of the charterers *ceased and determined*. On the other hand, what had the shipowner received as a sub-

stitute for the liability of the charterers? He received whatever the charterer was willing to give him: a lien of value on the cargo, if the charterer so chose, or nothing if such was the charterer's pleasure. As long as the form of the bill of lading was not settled, the charterer retained the power to nullify the value of the lien which was to be given to the shipowner.

As a matter of fact this is precisely what happened in this case. Bills of lading were presented by the charterer to the foreign captain for signature which made it impossible to enforce any lien against the cargo at Callao. No reference to the damages previously incurred was permitted by the charterer to be inserted in the bill of lading. The effect of this action of the charterer was the following: In case the bill of lading was not indorsed, and W. R. Grace & Co. were the consignees and receivers of the cargo at Callao, they remained liable for the demurrage under the terms of the charter-party. In case, however, the bill of lading was indorsed by respondent to third parties, before arrival of the ship at Callao, the cargo had to be delivered to the holder of the bill of lading at Callao without any means of enforcing a demurrage or damage claim against the cargo. The helpless captain protested in vain against signing the bills of lading presented by charterer, saying, in his letter to respondent:

“I only do so under protest as I claim demurrage * * * which you have declined

to pay me or to settle with me about” (Respondent’s Exhibit “C”, p. 217).

On April 20, 1907, the captain filed an official protest in the office of a notary public for the Province of British Columbia, “his vessel having been detained over and above her lay days as set forth in charter-party; and further *protests against signing bills of lading* as he had not been paid demurrage” (Respondent’s Exhibit “C”, p. 220).

Again on May 16, 1907, the captain, chief officer and sailmaker of the ship filed an official protest before the notary public for said province, in which it is recited that

“Charterers were telegraphed to by Captain to the effect that he would only sign bills of lading under protest, until his claim for demurrage was paid or acknowledged in writing, it having been refused. * * * Wherefore the said appearers on behalf of the owners of the said vessel * * * do protest * * * against the said charterers, and against their agents, and against all and every other person or persons whosoever responsible, or liable, * * * and holding them responsible and liable for the breach of said charter-party and for all demurrage, damage, injury * * * sustained by reason of said breach, delay, detention or other premises, and will sign bills of lading only under protest as herein mentioned” (Respondent’s Exhibit “B”, pp. 216, 217).

The record shows that, although the loading was completed on May 15th, the master had refused to sign the bills of lading, and was detained at

Millside, awaiting instructions from his owners in Germany, as late as May 21st, when he wrote to respondent:

“Under instructions from my owners I am today ready to sign bills of lading as you request, but only do so under protest as I claim demurrage amounting to \$2984.72, which you have declined to pay me or to settle with me about. * * *

Herewith is a copy of protest which I have made before a Notary for the reason that *you have prevented my signing bills of lading under protest*” (Respondent’s Exhibit “C”, pp. 217-218.)

It thus appears that the Captain, in the difficult situation in which he found himself, had attempted to preserve the rights of the owners in the bills of lading, but was prevented by the charterers from doing so. The master’s position was further embarrassed by the fact that the vessel, by the charter contract, was “consigned outward to charterer’s agent on Puget Sound or in British Columbia” (charter-party, cl. 92), so that he was, in a certain sense, dependent upon the advice and under the control of the very parties who insisted upon the particular form of the bill of lading against which he protested.

These protests were steps intended to preserve the rights of the ship against the charterers; by them the shipowner gave notice to the charterer: you are depriving me of my lien by your insistence upon this bill of lading; hence it is understood

that your personal liability for the unpaid demurrage shall continue.

If the cesser clause had read as follows:

“all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board *and bills of lading have been issued which adequately protect the lien on the cargo*”,

the cesser clause would be effective; but where the bill of lading fails to preserve, by adequate words, the lien which must be substituted as a consideration for the cesser of liability, the cesser agreement would be an attempt to deprive the shipowner arbitrarily of his rights without giving him an equivalent for the deprivation. A frequent form of the clause is: “Charterer’s responsibility to cease when the vessel loaded and bills of lading signed.” The lien on cargo, after it is placed on board, is of no value to the shipowner as long as the charterer retains the arbitrary power to nullify its enforcement. No effectual lien of value being, therefore, given to the libelants in this case, respondent is liable for the detention at the port of loading and its consequent damages.

In the leading case of *Crossman v. Burrill*, 179 U. S. 100, the cesser clause read: “Charterers’ responsibility to cease when the vessel is loaded *and bills of lading are signed*.” No doubt it would be implied that the bills of lading must be *proper* bills of lading, viz., such as preserve the rights of both shipowner and charterer.

In the case of *Schmidt v. Keyser*, 88 Fed. 799 (C. C. A., 5th Circ.), the cesser clause was formulated in these words:

“The charterer’s responsibility under this charter shall cease as soon as the cargo is shipped *and bills of lading signed, provided all the conditions called for in this charter have been fulfilled as provided for in the bill of lading.*”

In that case the court held that the signing of bills of lading did not operate to release the charterers from liability for demurrage accruing prior to the signing of the bills, even though the cesser clause—unlike the one in the case at bar—was sufficient to create the valid lien necessary to support an agreement that the charterer’s liability was to cease. The reason for the court’s decision was that the bills of lading stated that all the conditions of the charter had been complied with when, in fact, the demurrage claim was pending.

It is clear that unless bills of lading are issued which provide for the conditions called for in the charter, which, for instance, make provision for a demurrage claim which had accrued under the charter, the shipowner’s lien on the cargo is lost; and that, therefore, the proviso which constitutes a part of the cesser clause in the case of *Schmidt v. Keyser*, *supra*, is a term necessarily implied in every valid cesser clause.

(b) *The lien on the cargo, referred to in the cesser clause, was ineffective, because, under the charter-party, the charterer had the right to take or order the cargo out of the possession of the shipowner at Callao before receiving either freight or demurrage.*

The ordinary reason for the existence of the cesser clause in a charter-party is that the charterer desires to wash his hands of ship and cargo as soon as the cargo is on board at the place of loading. He does not care to follow the ship to the port of destination, which may be a foreign port in which he has no connection. The facts in this case show an entirely different condition. W. R. Grace & Co. have a house at the port of destination (p. 65), and stipulated in the charter-party that "*Vessel to be consigned to charterer's agents at port of discharge*" (p. 17). W. R. Grace & Co. were also the *consignees of the cargo* under the bills of lading (p. 10, p. 65). Respondents, in other words, were very much at home at the place of destination, having control there of both the ship and the cargo. Apart from the obvious fact that a German shipmaster would presumably find insuperable practical difficulties, even under the most favorable circumstances, in enforcing a lien upon his cargo at Callao, where respondent had a natural home, where the master was obliged to advise with and follow the orders of respondent as consignee of the ship, and where respondent appeared with the bill of lading claiming the cargo,

it is apparent that the master *under the charter-party, was obliged to deliver his cargo before he could claim even freight*. He was in a worse plight than was the master of the “Rygia” in the case of *Dewar v. Mowinckel*, decided by this court in 1910, and reported in 179 Fed. 355.

In that case this court said:

“The rule of construction of a charter-party which provides that the charterer’s responsibility shall cease on completion of the loading, and also provides that the charterer shall pay freight and demurrage for delay and creates a lien on the cargo for freight and demurrage, is that the cesser clause is to be construed, if possible, as *inapplicable to a liability with which the lien is not commensurate*.”

This court held that, as the charter-party required a discharge of the cargo at a place to be ordered by the consignee, and freight was only to be paid on final discharge, the cargo passed out of the possession of the master, and “*the lien for demurrage, like the lien for freight, is lost when the cargo is delivered to the consignee*”. “The lien of a shipowner for freight being but a right to retain the goods until the payment of freight, it is inseparably associated with the possession of the goods and is lost by an unconditioned delivery to the consignee”. On these grounds the court held that the cesser clause was not operative under the facts of that case.

In the case at bar the lien is not commensurate with the liability. Respondent had it in its ab-

solute power to cause the cargo to pass out of the possession of the master before he was entitled to any freight; for by the charter-party respondent agreed to pay the charter-freight to the libelants or their agents "in the manner following, that is to say: Fifty shillings (50) for each thousand feet, board measure, *delivered*" (Ap. p. 14). Before libelants acquired the right to receive any freight, they were obliged to deliver the cargo. Again the charter-party provides:

"Freight payable on the right and *full* delivery of cargo at final port of discharge" (Ap. p. 14).

In other words, every stick of lumber had to be not merely discharged, but *delivered* to consignee, being respondent herein, before libelants had the right to ask for one cent of the charter-freight.

What becomes of the value of the "lien" referred to in the cesser clause, under such circumstances?

(c) *The lien on the cargo referred to in the cesser clause was ineffective because respondent in this case, on account of its capacity of consignee of the ship, had complete control of the discharge at Callao and the power to make the enforcement of the lien not only difficult, but impossible.*

The charter-party provides:

"Vessel to be consigned to charterers' agent at the port of discharge".

The word "consigned" signifies that the vessel, upon her arrival at Callao, was to be delivered into the care and control of respondent, the charterer.

Ruttenberg v. Schefer, 131 Fed. 313, 321;

Sturm v. Boken, 150 U. S. 312, 326.

This vessel, under the contract of charter-party, was consigned to charterers' agents on Puget Sound inward and outward, had to clear at the Puget Sound Custom House in the name of the charterers and, after arrival, remained in the care and control of respondent who, by its agents, had both the right and the duty to do the ship's business at Callao. It was quite natural for the owner of a German vessel to make such an arrangement with a charterer who was at home both at Puget Sound and in Callao and therefore in a better position to attend to the affairs of the vessel abroad than the German master who presumably never stayed in a distant port long enough to become familiar with its laws or customs. If, in such a case, the master had refused to deliver the cargo to the consignee who satisfied respondent of his right to receive it, respondent's agent, as general representative of the ship and shipowner, could have ordered the master to deliver it, and could have thus prevented him from enforcing his lien. Even if it be admitted that respondent at Callao would have had no legal right to give such an order to the master, the fact still remains that under such conditions, and with such a provision in the charter-

party, it could have been made very difficult, and practically impossible, for the master to retain the cargo for the protection of his lien, had he otherwise had such a right.

**C. Because Under the Charterer's Bill of Lading
No Claim Could Be Made Against the Con-
signees.**

By the express stipulations of the charter-party the consignees of the cargo were made liable for the detention in this case; but, leaving the stipulations of the charter-party out of consideration for the moment, the bills of lading issued upon the demand of the charterer, and against the protest of the master, failed to mention the subject of demurrage or damages for which the charterers had become previously liable. But for the express stipulation of the charter-party no claim for damages could have been made against the consignees under such a bill of lading. If the cargo was sold before the arrival at Callao, the consignees had the right to the unqualified possession of the cargo upon arrival, under the bills of lading issued, and could laugh at libellant's damage claim. The principle is laid down in *Dayton v. Parke*, 37 N. E. 642, (1894, Court of Appeal, New York). In that case the bill of lading provided for delivery to the consignee or his assigns, "he or they paying freight as per charter-party", but the bill was silent upon the subject of demurrage. The court said:

“While a consignee, by accepting the goods consigned to him under a bill of lading by which the person receiving the goods is to pay freight is held bound by an implied contract to pay the freight, yet, *unless the bill of lading either itself or by reference to another instrument, contain also an express condition providing for the payment of demurrage, the consignee, in simply accepting the goods, will not be liable for the payment thereof.* Jesson v. Solly, 4 Taunt. 52; Bruncker v. Scott, id. 1; Evans v. Forster, 1 Barn & Ad. 118; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334.”

If, under such a bill of lading, no demurrage could be claimed from the consignees or their transferees; and if it be true, as contended by proctors for respondent, that the signing of the bill of lading operated the release of respondent from all prior liability, then the shipowners are, of course, left without any recourse whatsoever. But it is clear that the signing of such a bill of lading did not release the respondent; for, under the plain terms of the clause relied on, the charterers were to be released only by making such provision in the bill of lading as would make a settlement of all questions, whether of demurrage or otherwise, possible with the consignees.

III. RESPONDENT IS LIABLE FOR THE DAMAGES AS CONSIGNEE OF THE CARGO, BECAUSE IT IS SO EXPRESSLY STIPULATED IN THE CESSER CLAUSE UPON WHICH RESPONDENT RELIES.

The cesser clause provides:

“All questions, whether of demurrage or otherwise, *to be settled with the Consignees,*

the Owners and Captain looking to their lien on the cargo for this purpose.”

The consignees are the respondent in this suit; hence, by the agreement in the charter-party, the present question is to be “*settled*” with respondent. Certainly the right to settle with these respondents implies the right to bring an action against them in case they refuse to adjust libelants’ claim.

Respondent has heretofore contended that the words: “the owners and captain looking to their liens on the cargo for this purpose” imply that the enforcement of the lien on the cargo is the only method allowed the libelants to settle this question with respondents.

But it is respectfully submitted that there are several conclusive answers to this contention.

(a) In the first place it should be remembered that such a clause, if it purported to restrict libelants in the enforcement of acquired rights by the ordinary legal methods, must be strictly construed against the party contending for such a restriction. If the intention had been to restrict the shipowner to the remedy *in rem* as the *only* remedy, it would have been easy to express such an intention by clear words.

(b) In the second place, the effect of the construction contended for by respondent would be to strike out of the clause the words: “all questions, whether of demurrage or otherwise, to be settled with the consignees.” If these words were *omitted*,

the meaning of the remainder of the clause would be precisely what respondent is contending for; but the court is certainly warranted in concluding that the mere fact of the presence of these words makes respondent's construction of the clause forced and unnatural—apart from the principle that, in case of even balance and reasonable doubt, this question must be resolved in libellant's favor. It must be presumed that words which were inserted by respondent in its charter-party have a meaning and a purpose; and, if the meaning and purpose are ambiguous, that meaning must be given to them which maintains libellants' legal rights rather than a meaning which would result in the injustice of leaving libellants without a legal remedy in the face of an undeniable wrong.

(c) In the third place, the natural construction of the words: "All questions to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose", is the following:

The principal agreement is that, if such questions should arise, after the ship and cargo leave the port of loading, the owner of the vessel must settle them at the port of discharge with the consignees. The addition of the words "the owners and captain looking to their lien on the cargo for this purpose" is only a statement of the reason or reasonableness of making such an agreement, pointing out to the shipowner that he is taking a small chance, as his claim against the consignees is *secured* by the lien on the cargo. No obligation is

intended to be placed upon the shipowners by the added words; but this possible, and in most cases more valuable and effective remedy, is added to the other possible remedy of suing the consignees in personam in order to satisfy the shipowners as to security. The purpose of the clause is to inform the shipowner that, after a certain stage in the transaction, he must settle certain claims pending with another party than the charterer, viz. with the consignee, who may be unknown to him; that he is losing nothing by such an arrangement, as he can look to the security of his lien on the cargo.

(d) Any construction whereby libelants would be confined to the remedy in rem, and deprived of their remedy in personam, would have the effect of invalidating the clause, "the owners and captain looking to their lien on the cargo for this purpose" altogether, on the ground that such an agreement would be an attempted ouster of the court's jurisdiction and as such void.

The agreement between shipowner and charterer is plainly that libelants were to settle the present question with respondent consignee. Respondent's argument, on the other hand, is that libelants have no right to settle the question with consignee, but must, if at all, enforce their claim by proceeding against the cargo; that, having failed to proceed against the cargo, libelants have lost their rights and their remedies.

Leaving aside the special agreement made between the parties to this suit in their charter-party,

the general law provides that libelants, in a case of this nature, have two remedies: either to proceed in a purely personal action against respondent, or to file an admiralty suit in rem against respondent's cargo. Any contract to waive either one of these rights or remedies would be against public policy and consequently void. The late Judge De Haven, in the case of *The Tampico*, 151 Fed. 689, in which the writer was interested as proctor, laid down in lucid language the principles upon which we rely in this connection. It was there held that an agreement of waiver, on the part of the libelant, to proceed in rem against a vessel for the recovery of damages to cargo is void, because opposed to public policy. His Honor said (on page 692):

“The law gives two remedies in a court of admiralty * * * the action in rem against the vessel and an action in personam against the carrier—either one or both of which the shipper has the right to pursue until he has obtained full satisfaction. * * * But parties are not at liberty, when entering into a contract, and as part of it, to agree that, in case of its breach, only one particular remedy shall be pursued, when the law upon considerations of public policy gives more than one.”

On this phase of the cesser clause in the charter-party the proper construction of that clause is, therefore, that the parties to it intended that all questions should be settled with the consignees in any legal way open to the parties; that there was no intention to deprive the vessel of any particular right or remedy as against the con-

signees, and that the words "the owners and captain looking to their lien on the cargo for this purpose" were added to point out to the vessel owners the security to which they could look in the settlement of their claim against the consignees.

The consignees in this case are W. R. Grace & Co., respondent.

Resume of the Argument.

Reviewing the argument, it may be well to reconsider briefly the constituent parts of the cesser clause in this case. They are:

- (1) "*Vessel to have a lien on cargo for all demurrage.*"

"Demurrage" is damage connected with the loading or discharging of cargo.

The detention at Royal Roads was not connected with either loading or discharging and, consequently, was not "demurrage" in the strict sense.

Hence this part of the cesser clause confers no lien upon the cargo for the liability incurred by respondent.

- (2) "*All and any liability of the charterers shall cease and determine as soon as the cargo is on board.*"

After the cargo was on board, the charterer had still the power to make the alleged lien valueless, either by acts at the loading place

or by acts at the place of discharge. Hence the lien is inadequate.

- (3) *“All questions, whether of demurrage or otherwise, to be settled with the consignees”.*

The consignees in this case are the respondent in the suit. Hence respondent is liable.

- (4) *“the owner and captain looking to their lien on the cargo for this purpose.”*

Libelants had no lien on the cargo for the damage suffered by reason of matters arising before loading of the cargo; and

Furthermore this part of the clause is intended only to point out one remedy to which he can look for security.

It is respectfully submitted that the losses which the libelants suffered call loudly for a remedy, and that a just construction of the cesser clause will prevent the denial of justice which would be the result of the decision of the lower court.

Dated, San Francisco,

October 4, 1916.

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

GOLDEN W. BELL,

Proctors for Appellants.

7
No. 2750

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MARTIN H. A. ELVERS and FREDERICK A. E.

ZIMMER,

Appellants,

VS.

W. R. GRACE & COMPANY (a corporation),

Appellee.

APPELLEE'S BRIEF.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Appellee.

Filed this.....day of November, 1916.

Filed

FRANK D. MONCKTON, Clerk.

NOV 4 - 1916

By.....Deputy Clerk.

F. D. Monckton,

Clerk.

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APPELLEE'S BRIEF.

Opening Statement.

Appellant's "Introductory" seems to us to be much out of place, as does also his arguments based upon testimony taken in the case, and neither appears to have any legitimate purpose.

As conceded in the brief,

"The principal question *on this appeal* is the question of law whether the cesser clause of this case constitutes a defence to libelant's action" (Br. p. 3),

and to this alone are appellant's "Points and Authorities" directed (pp. 14 to 44), while the appeal itself is from a decree sustaining the exceptions to the libel. No

questions of fact were considered or passed upon by the lower court, and in appellant's brief they are only used to "point a moral and adorn a tale".

The brief contains a collection of strong adjectives, which in various forms appear again and again throughout the brief, with a view of impressing the court with the idea that the case is one of "aggravated injustice"—"a flagrant case of playing fast and loose with helpless ship-owners who were thousands of miles away, and not in a position to protect themselves", which "call(s) loudly for a remedy".

Should we at any time hereafter be called upon to discuss the evidence, we feel satisfied we can convince the court that the record does not warrant such statements, while there is much in the conduct of appellants open to serious reflection. But we do not intend to adopt appellant's methods.

The free use of such exaggerated statements seems clearly to point to a single purpose, namely, to invite the court to illustrate the old saying that "hard cases make bad law".

It is a confession of weakness.

It seems to us, also, that we might with much confidence rely for refutation of this claim of "aggravated injustice" upon the sense of justice of the judge of the lower court, whose reputation for a keen sense of justice is undisputed. He had before him *all the facts*, as well as the exceptions to the libel, and therefore had the opportunity of basing his decision *upon the facts*, as well as upon the "*technical defence*", of which appel-

lant complains, and yet he chose to lay aside the consideration of those facts which, according to appellant, contain the evidence of the alleged “aggravated injustice”, and based his decision upon the legal proposition that the libel does not state a cause of action. May we not assume that his ear was also open to “a case where justice demanded more loudly redress for a commercial injury”, if in fact this were such a case?

One cannot read the opinion in this case without being impressed with the mental attitude of that court. Having before him the previous order of Judge De Haven, he approached the question of law involved with hesitancy, and surely if the facts of the case then before him evidenced any injustice to the ship-owner, let alone an “aggravated case of injustice”, it would have been an easy matter for him to have adopted that construction of the charter-party and rendered judgment for the libellant upon the facts, if the facts warranted such judgment.

The final decree from which appeal is taken, is in the following terms (p. 147):

“The above cause having come on for hearing and the said cause having been tried upon its merits, the said libelants applied for leave to file an amended libel to conform to the proofs, and said application having been granted, thereupon said libelants filed an amended libel, to which the respondent excepted, upon the grounds, among others, that the said amended libel did not state facts sufficient to constitute a cause of action against this respondent; and said exceptions having been argued and submitted by the proctors for the respective parties, and due deliberation being had in the premises:

It is now ordered, adjudged and decreed that *said exceptions be, and the same are hereby sustained*, and the said amended libel be, and the same hereby is dismissed with costs to the respondent herein.

Endorsed: Filed June 3, 1915."

It is from this decree that appeal is taken (Notice of Appeal, p. 149).

This decree shows clearly that the said cause was not considered or decided by the court upon the merits, but solely and only upon the allegations of the libel, and exceptions thereto, and the final decree, from which this appeal is taken is a decree based upon questions of law raised by the said exceptions, and not based upon any of the facts submitted upon the hearing.

Why the appellant chose, in this case, to bring up the entire record, instead of simply the libel and exceptions, which are the basis of the judgment, was a mystery to us until we had the privilege of reading this "Introductory". But we now submit that that record is not before this court. It is not a part of the proceedings upon which the judgment is based, and this court is not in a position to render any decree upon the facts of the case. The respondent is entitled to the judgment of the lower court upon the facts, before this court shall undertake to *review* the case upon the facts.

We feel further justified in this position by the fact that libellant's brief does not attempt a discussion of the case upon its merits. It is true that, in their "Statement of Facts" they make some reference to the testimony, but there is no attempt at a discussion of

the case from that point of view. The reference to the testimony is only used for the purpose of illustrating their view of the construction of the charter-party, and their "*Points and Authorities*" are confined to the question of construction alone. This is further exemplified in their "Résumé of the Argument".

There are many questions involved in the case upon its merits; such, for instance, as whether or no the libelants Elvers and Zimmer are parties to the contract of charter-party; the question as to whether or no orders as to loading mill were given within forty-eight hours after arrival of the vessel at Royal Roads; the question as to whether or no the loss of time was caused by the failure of charterers to produce its stevedore; the question of whether or no the loss of time is confined to the "nine days waiting for stevedore", which the ship claims it did, or whether or no it is the fault of the master that he did not sooner procure their attendance; the question of whether or no any delay in securing the services of the stevedore after one had been named, is the ship's time or the charterer's time; the question of how much time should be allowed the charterer for loss by strikes, which are excepted in the charter-party; the question as to whether or no the master delayed the loading by refusing to receive cargo; and similar questions, none of which are disclosed in any of the argument presented on behalf of the appellants.

We will therefore confine ourselves to a consideration of the question of law raised by the pleadings, and the decision founded thereon. Should the court determine that we are in error in taking this position, and if the

consideration of questions of fact raised by the evidence brought up by this record be involved, we confidently rely upon being given an opportunity for a rehearing and a reargument upon said questions of fact, there being, as we conceive, a lack of evidence in several material respects to charge these respondents with liability, even though the cesser clause be held inapplicable.

WHAT IS THE QUESTION AT ISSUE?

Before attempting to discuss the question of law involved, it is necessary that we should have clearly in mind what the proposed subject of discussion is.

It will be noticed that a large part of the appellant's argument is based upon the contention that

“The cesser clause does not apply to the case at bar, because *this is not a question of demurrage* either in loading or discharging. The libellant sues respondent *for wrongs done to his ship before the loading commenced*” (p. 23).

It is well to dispose of this contention at the outset, and to that end let us see what the record before the court is.

The amended libel contains a heading,

“AMENDED LIBEL FOR DEMURRAGE” (Rec. p. 21).

It alleges (Art. II, Rec. p. 122, fol. 100):

“And it was further provided by said charter party that orders as to loading mill shall be given within 48 hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of ship at Port Angeles, Port Townsend or Royal Roads, failing which *lay*

days to begin. And it was further provided by said charter party that said respondent should be allowed for the loading of said vessel, lay days as follows: Thirty (30) working lay days for loading (not to commence before the first of February, 1907, unless with charterer's consent), to commence 24 hours after the vessel is at loading place satisfactory to charterers, inward cargo and or unnecessary ballast discharged and ready to receive cargo, master having given written notice to that effect. And it was further agreed by said charter party that for each and every day's detention by the fault of respondent or agents, said respondent should pay to libelant *demurrage* at the rate of 3d sterling per registered ton per day."

A copy of the charter-party is attached, marked "Exhibit A", but does not appear to have been printed in the record in this connection. It, however, is printed in the record as "Exhibit A" to the original libel, pages 12 et seq., and the particular portion to which the above quotation refers is line 52, pages 14 and 15.

Article III, after setting forth in some detail the occurrences, concludes (p. 124):

"That the *lay days* for the loading of the cargo of said ship, pursuant to the terms of the charter party, should have begun on the 7th day of March, 1907, and should have ended on the 12th day of April, 1907."

Article IV alleges:

"That said respondent by its own default did not load the said ship within the 30 working lay days in said charter party agreed upon, but contrary to the terms of said charter party, said respondent delayed said ship until the 15th day of May, 1907, thereafter" (pp. 124-25).

Article V alleges:

“That libelants by the acts and defaults of respondent as aforesaid, became entitled to demand from respondent *demurrage* for 33 days, at the rate of 3d per registered ton per day amounting to the sum of \$3762.91, over and above all just deductions” (p. 125).

Article VI alleges the issuing of bills of lading,

“But which said bills of lading contain no reference to the *demurrage* previously incurred” (p. 125).

Article VII alleges:

“That notwithstanding respondent has been requested to pay the said sum of \$3762.91, the *demurrage* aforesaid, respondent has refused, and still refuses to pay the same, or any part thereof” (pp. 125-26).

And the prayer asks the court:

“To decree the payment of the *demurrage* aforesaid” (p. 126).

The exception to this amended libel is pointed to the fact that the libel does not state a cause of action, and upon this point it raises, as *one* of the issues, the discharge of the respondent by means of the cesser clause, which confers a lien for *demurrage*.

We respectfully ask, in view of these express allegations of the libel, how can the libelant be heard to claim

“This is not a case of *demurrage* either in loading or discharging”?

Is he not estopped, by the express averment of his libel from setting up such a claim? This is the theory

upon which he has called us into court to defend, and is the theory upon which he has been met, as well as the theory upon which the decision of the lower court is given.

But let us consider the contention from another point of view. It is said (Br. p. 22):

“(a) By *strict* construction the charter-party provision for ‘demurrage’ referred to in the cesser clause, applies only to *discharge* of the cargo.

The clause gives the vessel a ‘lien on cargo for demurrage’ (16), and ‘demurrage’ is defined in the following connection:

Discharge to be given with dispatch according to the custom of the port of destination, at such safe wharf, dock or place as charterers may direct, but at not less than 3500 ft. B. M. per day. For each and every day’s detention by the default of the party of the second part or agent they agree to pay to the said party of the first part, *demurrage* at the rate of 3d sterling per registered ton per day (pp. 14-15).

From such construction it would follow that it was the intent of the cesser clause to relieve the charterers only from demurrage at the port of Callao, the discharging port.”

Here, again, appellant fails to state the whole case.

Immediately preceding the language above quoted by appellant from the charter-party, and as part and parcel of the same subject matter, being paragraph 52 (Rec. p. 14), we have the following:

“Said party of the second part shall be allowed for the *loading* and discharging of said vessel at the respective ports aforesaid, lay days as follows: Thirty (30) working lay days *for loading* not to

commence before 1st Feby. 1907, unless with charterer's consent, to commence twenty-four hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo; master having given written notice to that effect."

Then, on the same line, follows:

"*Discharge* to be given with dispatch", etc., as noted above, ending with the agreement to pay *demurrage* for each and every day's detention, etc.

It will scarcely do to emphasize a part of a provision with italics and to disconnect it from the rest of the provision, for the purpose of construing the contract, whether the construction is to be strict or liberal.

But that is not all.

A previous provision of the charter-party, namely, paragraph 30 (Rec. p. 13) provides:

"Orders as to loading mill to be given within forty-eight hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend, or Royal Roads, *failing which* LAY DAYS TO COUNT."

It follows from this that the thirty working *lay days* after which *demurrage* is to be paid, *are to count*, upon a failure to give orders as to loading mill *within forty-eight hours after vessel arrives at Royal Roads*.

This seems to have been overlooked by appellant, for he says (Br. p. 24):

"Even if 'demurrage' be extended to apply to loading, it cannot fairly be applied to the period

before the beginning of the lay days, or to anything happening before noon, May 13th."

Since the lay days *are to count from the earlier period*, this argument must be deemed completely answered, on the face of the charter-party.

All this, too, in the face of the fact that the amended libel *includes both periods* in its claim for *demurrage*.

In view of the foregoing, what becomes of the argument that this is "not a case of demurrage"?

IS THE CESSER CLAUSE OPERATIVE?

What, then, is the proper construction of the charter-party in this case?

While we do not feel that much need be said in this connection beyond what is said by the District Court in its opinion, which we fully adopt, it may not be out of place for us to state the case in our own language:

Appellant's entire brief is addressed to the proposition that this court *should read the cesser clause out of the contract*, either by the expedient of pronouncing it void, or by any other expedient that will accomplish the same purpose.

The clause in question is in the following language:

"Vessel to have a lien on cargo, for all freight, dead freight and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the

consignees, the owners and captain looking to their lien on the cargo for this purpose."

Prima facie, this clause means what it says, and if it is to be deprived of its apparent meaning and intention, it can only be done because, taking the instrument *as a whole*, and having due regard to other provisions therein contained, such a result follows from the construction of the *entire instrument*.

In what we are about to say we do not lose sight of the rule announced in *Clinck v. Radford*, and quoted by the Supreme Court in *Crossman v. Burrell*, 179 U. S. 107, in the following language:

"In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter party is, that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the ship-owner would be left unprotected in respect of that particular breach, *unless the cesser clause is expressed in terms that prohibit such a conclusion.*"

As a résumé of what is said in the two English cases there referred to by the Supreme Court, the latter court said:

"In short, in a charter-party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the ship-owner, the cesser clause is to be construed, *if possible*, as inapplicable to a liability with which the lien is not commensurate." (The italics are our own.)

We shall presently distinguish our case from the cases above cited.

Before, however, turning to that phase of the argument, we wish to call attention to certain fixed principles of law which have become axiomatic.

The court is bound so to construe an instrument as to give effect to all its terms, and not to construe it so as to render any of its provisions void.

It is not necessary to cite this court to authority for such a purpose. It has been expressed in different language by courts and text-writers, as for instance,

“It is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effectual rather than void” (123 Cal. 143).

Again:

“An interpretation which gives effect is preferred to one which makes void” (*Maxims of Jurisprudence*, C. C. of Cal., Sec. 3541).

Again:

“A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties” (*Broom's Legal Maxims*, p. 410).

It is said by that author (p. 411):

“It is then laid down repeatedly by the old reporters and legal writers, that in construing a deed, *every part of it must be made, if possible, to take effect*, and every word must be made to operate in some shape or other. The construction, likewise, must be such *as will preserve rather than destroy*; it must be reasonable, and agreeable to common understanding; it must also be favorable, and as near the minds and apparent intents of the parties as the rules of law will admit, and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reasons and means to make acts

effectual according to the just intent of the parties; they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words."

The same idea is also often expressed by saying:

"The court can only construe a contract, it cannot make a contract for the parties."

And this idea is perhaps best expressed in the language of the Code of Civil Procedure of the State of California, Sec. 1858, as follows:

"The office of the judge is simply to ascertain and declare what is in terms or in substance *contained therein, not to insert what has been omitted, or to omit what has been inserted.*"

Charter-parties, like other instruments, are to be construed in this light. Indeed they are to be more favored in this respect than instruments of a more formal character.

Notwithstanding the leaning of the court to construe the cesser clause as inapplicable where the lien *by the terms of the charter-party* is not commensurate with the liability, it nevertheless has been held that where the words make it clear that such was the *intention of the parties*, the courts have held the charterers relieved, *even though the effect of such a decision was to deprive the ship-owner of his remedy* (*Oglesby v. Yglesias*, Ellis, Blackburn & Ellis, 930; *Milvain v. Perez*, 3 Ellis & Ellis, 495). And this rule we believe to be recognized

by all the decisions. Even in *Crossman v. Burrill* this is recognized, for the quotation from *Clink v. Bradford*, favoring a construction that will preserve the lien, contains the exception "unless the cesser clause is expressed in terms that prohibit such a conclusion".

WHAT WAS THE REAL INTENTION OF THE PARTIES.

With this introduction as to the manner of construing the contract, let us examine the cesser clause, with a view of ascertaining what the real intention of the parties was as therein expressed.

1. In the first place, a lien is given, followed with the provision:

"It being understood that all and *any* liability of the charterers under this agreement shall cease."

In this connection it will be recalled that appellant has argued (Br. pp. 14-16) that "the language that the 'liability of the charterers shall cease and determine as soon as the cargo is on board', is ambiguous" (Br. p. 14). Note, in this connection, that he has left out of the language which he thus claims to be ambiguous, the important words "*all and any*". Subsequently, however, on page 16, he proceeds:

"If it be argued that the language 'all and any liability of the charterers under this agreement shall cease and determine, is broad enough to include such liability as is the subject matter of this suit, we call the attention of the court to the answer of Blackburn, J., to a similar argument in the *Christoffersen* case above cited. When counsel in that case argued that 'liability' as well before as after (the loading) cannot mean more than 'all lia-

bility', Blackburn, J., answered: 'But on the other hand, "all liability" may mean something less'."

From the foregoing it will be seen that, while apparently he is giving consideration to the provision in this charter-party "all and any liability", he is again ignoring the word "*any*", in which respect the language of this charter-party differs from the language which Blackburn, J., in the *Christoffersen* case said "May mean something less". Indeed, it seems to us impossible in any just view of the language used, to conceive that when the parties provided that "all and *any* liability" shall cease, they did not thereby intend to express, and in fact did express, in the broadest terms, that no liability of *any kind* should remain.

Now, read this language in connection with what follows, namely:

"All questions, whether of demurrage or otherwise, to be settled with the consignees, owners and captain looking to their lien on the cargo for this purpose."

Could any language be more explicit to express the intent of the parties that the owner should look to his lien for the satisfaction of *all* claims, whether demurrage or otherwise? We respectfully submit that the terms of this cesser clause are so explicit that it cannot justly be construed "as inapplicable to the particular breach complained of", even "if by construing it otherwise the ship-owner would be left unprotected in respect of that particular breach".

In other words, that it meets in every particular the exception referred to in *Clink v. Bradford* and quoted by

the Supreme Court in *Crossman v. Burrill*, expressed in the following language:

“That the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, *unless the cesser clause is expressed in terms that prohibit such a conclusion.*”

To our mind, this cesser clause “is expressed in terms that prohibit such a conclusion”.

It is therefore in a legal sense “impossible”, without violating the plain intent and expressed purpose of the parties, to so construe this cesser clause as inapplicable to the particular breach here complained of.

2. Many suggestions are made by appellant under the heading “*Principles of Construction of the Cesser Clause*”, which it might not be out of place to consider in this connection. It is said that

“The ship-owner could know nothing of the consignees at Callao”, etc.

and that

“He would be under practically insuperable difficulty in proving his case against unknown persons in Callao in respect of delay occasioned to his ship while in Puget Sound, and would be obliged to sue them in a foreign court where his lien might be of no substantial value” (Br. p. 15).

These considerations beg the entire question.

It is immaterial whether or no the ship-owner knows anything of the consignees at Callao. It is the cargo that is his security. While, in the terms of the cesser clause they are to settle with the consignees, in so doing

they are to “*look to their lien on the cargo for this purpose*”. That is their security.

It is interesting to note, that in another part of his brief, and for another purpose, appellant recognizes this fact, for he argues that the words,

“The owners and captain looking to their lien on the cargo for this purpose”,

is a

“pointing out to the ship-owner that he is taking small chance, as his claim against the consignees is *secured* by the lien on the cargo” (Br. p. 40). (The italics are his own.)

Again, appellant says:

“The purpose of the clause is to inform the ship-owner that, after a certain stage in the transaction, he must settle certain claims pending with another party than the charterer, viz., with the consignee, *who may be unknown to him; that he is losing nothing* by such an arrangement, *as he can look to the security of his lien on the cargo*” (Br. p. 41).

This, he says, is “the natural construction of the words” (Br. p. 40).

What then becomes of his objection that “the ship-owner could know nothing of the consignees at Callao”?

So, also, it is immaterial whether or no there would be difficulty in proving his case. There might be, and in fact has been, difficulty in his proving his case in the jurisdiction which he has sought, and more than all else, it is immaterial that they “would be obliged to sue in a *foreign court*”. In this connection, it is interesting to note that appellant makes repeated reference

to the fact that this *German* ship-owner would be obliged to sue in a "*foreign court*". Was not the port of loading a "*foreign court*" for him? Is not this a "*foreign court*" to him, which is neither the port of loading nor the port of discharge? And if it be said that this is a domestic court for the respondent, is Callao not also a domestic court for the respondent, since it is repeatedly suggested in appellant's brief that "respondent has a branch house in the distant port of discharge and therefore being more at home there than at the port of loading"? (Br. p. 13).

Moreover, so far as the contract is concerned is this not a "*foreign court*"? It is neither the port of loading nor of discharge, both of which are outside of American jurisdiction.

a loading port", we have simply to refer to the opening portion of this reply, which shows conclusively that, so far as this court is concerned, this is a case of liability for demurrage.

4. The next proposition urged by appellant is, that if the cesser clause protects respondent from liability, for its breach of contract, "the innocent ship-owners are left without any remedy for their loss" (Br. p 17). Or, as stated on the following page:

"We shall show that the 'lien on cargo for demurrage' in this case, is not commensurate with the liability on which the suit is based, and that, consequently, the cesser clause is inapplicable to this case" (Br. p. 18).

We do not see anything following this to the point, except the statement:

“In the case at bar respondent required the German master and ship-owner to settle at Callao a dispute which can certainly be better settled in an American court. It may also be conclusively presumed that a lien to be enforced by a German master in a Peruvian court is an illusory substitute for a claim against an American firm to be decided by a court of its domicile.”

We have already adverted to this claim, but the meat of this suggestion lies in the claim that “it may also be *conclusively presumed* that a lien to be enforced by a German master in a Peruvian court is an illusory substitute for a claim against an American firm to be decided by a court of its domicile”. Why would it be so “conclusively presumed”? Is it not, as a matter of fact, presumed to the contrary? Is it not a presumption that a Peruvian or any other foreign court will do justice? And is it not also presumed that the law of a foreign jurisdiction is the same as the law of this forum? And does it not also appear by appellant’s own statement that the American firm is also domiciled at Callao?

5. The next proposition urged is that the clause

“Is intended to apply only to cases where charterers and consignees are distinct persons, but such an agreement obviously was not intended to have, nor does it have, any application to a case like the one at bar, where there is no distinct consignee, but where charterer and consignee are the same person” (Br. p. 19).

In support of this contention, the clause of the charter-party is referred to, that “ ‘all questions whether of demurrage or otherwise’, are ‘to be settled with the consignees’, the liability of the charterers having ceased” (p. 19).

It is hard for us to appreciate the logic of this suggestion. It must be conceded that the charter-party and the bill of lading are two distinct contracts.

In the present case the suit for recovery is based upon the contract of charter-party, not upon the contract of bill of lading, and it would seem to us to be immaterial, so far as this question is concerned, whether the consignees and the charterer be, or be not, the same person. It may be that appellant might have had two different causes of action against the same person arising each upon a separate contract, but a liability under one contract does not affect the question of liability under the other.

Nor is this all.

In this connection appellant again ignores the material provision of the contract contained in the sentence upon which he relies. The provision is not that “all questions, whether of demurrage or otherwise, are to be settled with the consignee”, but it is “All questions whether of demurrage or otherwise to be settled with the consignees, *the owners and captain looking to their lien on the cargo for this purpose*”.

Hence, whether the respondent be consignee, or be not consignee, the remedy is by enforcement of the lien.

6. The next proposition is based upon the idea that

“Respondent was not a local agent for a foreign principal in loading the ship, but had assumed the responsibilities attending the discharge of the cargo at Callao” (Br. p. 21).

While it is said

“The purpose of the cesser clause is to protect a charterer who, in making the charter-party, acted as local agent for a foreign principal, and who, after he has placed the cargo on board, wishes to wash his hands of the whole transaction and to relegate the ship-owners to the principals for whom he shipped the cargo” (Br. p. 20).

He cites *Crossman v. Burrill* to the effect that such is “the ‘presumed purpose’ of the cesser clause”. We cannot understand how this fact, if it be a fact, can control the explicit terms of the agreement. It is immaterial what the “presumed purpose” may be. But as a matter of fact the responsibility of “attending the discharge at Callao of the cargo, which is said to have been assumed by respondent, is not such responsibility at all. Under the charter-party the vessel is consigned to charterer’s agents at port of discharge “for transacting vessel’s inward business”. This does not place upon the charterers the responsibility for the discharge of the cargo, which rests with the master, but has simply to do with the financial transactions, such as paying the bills, and disbursing the vessel.

How the cutting off of the personal liability of respondent “as soon as the cargo is on board” can be said to be “in effect” “an ouster of jurisdiction, and as such against public policy” we are again at a loss

to understand. The page of *Carver* referred to makes no such suggestion.

7. What is further said, on pages 24 and 25 of said brief, is to the effect that the cesser clause has no force as applied to charter's liabilities accruing at the time when the ship was uncertain as to whether she would ever receive a cargo, for the charterer has no right to substitute for his liability a lien upon a future, prospective and merely contingent cargo, which, as far as the ship-owner's position on March 4th was concerned, may never be loaded", etc.

The answer to this is contained in the terms of the cesser clause itself, for it is therein provided that

"All and any liability of the charterers under this agreement shall cease and determine *as soon as the cargo is on board.*"

There is no claim here that *if a cargo had never been placed on board* the personal liability of the charterers would have ceased for this antecedent liability. But it is in the same position as the liability of the charterer for delay during the process of loading itself. None of that antecedent liability does, or is, by the very provisions of the charter-party to cease *until the cargo is on board*, but when the cargo is once on board, all antecedent liability, whether preceding the process of loading, or during the process of loading, ceases.

8. The next suggestion under this heading is that the cesser clause is ineffective,

"because there is *no consideration for the cesser agreement*".

The case cited in support of this proposition is not in point. In the first place, the contract there under consideration contained no cesser clause whatsoever, but it was attempted to draw by *implication* an agreement for cesser of liability from the following provision of the bill of lading:

“The Cargo: Consignees or assignee shall pay demurrage * * * which freight and demurrage shall constitute a lien upon the cargo.”

The court said:

“Such a construction is quite inadmissible in the face of the express provision of the charter party that ‘demurrage shall be paid,’” etc.

It is true the court added the suggestion that “giving a lien for freight and demurrage adds nothing, because that lien exists by the maritime law of this country without any stipulation”. But that is very far from saying that if there had been an express provision for the cesser of liability in a contract for which a lien had been given, that there is no consideration for the cesser of liability.

In fact, if that were the rule, there would be no need for the decision of the Supreme Court in *Crossman v. Burrill* that

“In a charter party which contains a clause for cesser of liability of the charterers coupled with a clause creating a lien in favor of the ship-owner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate”,

because, whether commensurate, or not commensurate, if it is not sufficient consideration for the cesser of lia-

bility, the fact that the cesser of liability was "coupled with a clause creating a lien in favor of the ship-owner", would be immaterial. Indeed there would be no such thing at all as a cesser clause to be discussed in American courts.

The argument also leaves out of sight the other provisions of the charter-party. The *agreement to pay charter hire* is a consideration for each and every clause in the charter-party in favor of the charterer, and there is no decision in the books which holds that the cesser clause requires a special and independent consideration to support it. The only thing upon which the courts insist is, that the lien which is given shall be commensurate with the liability waived.

Crossman v. Burrill a mistake.—We might go even further than this, and adopting the suggestion of appellant that

"In the United States 'it is well settled that a vessel owner has a maritime lien on a cargo of the person responsible for the detention, enforceable in admiralty, regardless of the existence or non-existence of an express contract for a lien',

we come naturally to the logical conclusion that the rule laid down in *Crossman v. Burrill* is a mistake in this country. It is expressly founded upon the English rule, as laid down in *Clink v. Radford*, but since, as said by appellant,

"In England the legal force of the lien granted to the shipowner depends solely upon the agreement of the charterer",

while in the United States the lien is given by law, irrespective of the agreement of the parties (and which proposition we think to be correct), then the *reason* of the rule upon which the Supreme Court relied for its decision in *Crossman v. Burrill* fails in this country, and the agreement for a cesser of liability is valid and enforceable *irrespective* of what the *contract* may provide with respect to the lien. Were this a case of first impression, we would most confidently urge this consideration upon the court, and contend that the English construction of the cesser clause is not applicable in this country.

9. The next proposition urged by appellant is, that the cesser clause in suit leaves it within the power of the charterer to make the agreed lien valueless by the subsequent act of the charterer.

This is based upon the idea that it is in the power of the charterer to cause a bill of lading to be issued which would not carry with it the provision for a lien contained in the charter-party, and he says that

“as a matter of fact that is precisely what happened in this case”.

He then refers to the record to prove that the master protested against signing the bills of lading, without being permitted to *insert in the bill of lading* reference to demurrage previously incurred.

This is *not* what occurred, even if we are to look to the evidence referred to by the appellant. The captain did *not* protest against signing bills of lading because no reference to damages previously incurred was per-

mitted by the charterer to be inserted in the bill of lading, neither does it appear that the charterer prevented any such reference in the bills of lading. What does appear is, that the master protested because he had a claim for demurrage "*which you have declined to pay me or to settle with me about*". In the language of the protest he "protested against signing bills of lading as he *had not been paid demurrage*".

Again, it is said "charterers were telegraphed to by captain to the effect that he would only sign bills of lading under protest, until his claim for demurrage was paid, or acknowledged in writing, it having been refused".

Note, that this "acknowledgment in writing" makes no reference to endorsement on the bills of lading, but was simply and only a desire to have a separate written document acknowledging liability for demurrage.

Again:

"I claim damage amounting to \$2984.72 which you have declined to pay me or to settle with me about * * * Herewith is a copy of protest which I have made before a notary for the reason that you have prevented my signing bills of lading *under protest*" (Br. pp. 28, 29, 30).

On the other hand, if we refer to the libel, which we still regard as the only record before the court, we have no such statement of fact. On the contrary, the libel sets forth, in article VI, page 125, that

"the master of such ship, on demand of the charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter party as aforesaid by duly made protest,

issued bills of lading to said charterers, to wit, respondent, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which said bills of lading contained no record of the demurrage previously incurred”.

There is no suggestion in the libel that the master was *prevented* by the charterer, or by any one else, from preserving the rights of the owner by inserting in the bill of lading the reference to demurrage previously incurred. He states precisely what the record shows did occur, viz., that the master, on demand of the charterers, *issued a bill of lading*; that the bill of lading contained no reference to demurrage, but that the master reserved his rights on account of such breach by duly made protest. That was all that he attempted to do, that is all he thought of doing and that is all that is discussed in that connection.

The conclusion, therefore, of counsel, that the master “had attempted to preserve the rights of the owners *in the bills of lading* but was prevented by the charterers from doing so”, is not an accurate statement of the condition, as appears from his own record.

This matter of the preservation of the lien in the bill of lading has been fully considered by the lower court in its opinion, and we think therein satisfactorily disposed of (Rec. p. 145). However, we take the liberty of enlarging upon it as a question of law, and incidentally in this respect to distinguish the case at bar from that of *Crossman v. Burrill*.

The charter-party in the *Crossman* case was different in a material respect from this charter-party, and the facts before the court were likewise different.

In the *Crossman* case, the charter-party required "the bill of lading to be signed *as presented*, without prejudice to this charter". (Italics are our own.)

In the present case, the only provision in the charter-party which controls the bill of lading, is the provision that the *bills of lading* are "to be signed for pieces" with the clause

" 'all on board to be delivered' and at any rate of freight shippers may desire without prejudice to this charter; but if at a lower rate than provided in charter, difference to be paid in cash at port of loading, less commission, interest and insurance".

The material difference between these two provisions of the charter-party lies in the fact that in the *Crossman* case *by the terms of the charter-party* the master *had no discretion* with respect to whether or no the bill of lading should be expressed in such terms as would import into it the lien clause of the charter-party; he was to sign bills of lading "as presented"; while in the present case the *charter-party did not deprive* the master of his right to demand a bill of lading of the character above indicated; the only restrictions upon this bill of lading being that he shall "sign for pieces" and fixing the rate of freight which the consignee was to pay, by reason of the attendant provision in no way affected the rights of the ship-owner.

Unlike the *Crossman* case, in the present case it is immaterial what the bill of lading contained, or did not

contain, because it was within the power of the master, so far as the provisions of the charter-party are concerned, to have made the proper references in his bill of lading to the demurrage clause in the charter-party, and any act of his, in this respect, whether it be a waiver or an oversight, does not alter the contract of charter-party, which alone is the instrument to be construed.

Upon this subject, the only facts before the court are the allegations of the amended libel (Art. VI, p. 4):

“That on or about the 15th day of May, 1907, *the master of the said ship*, on the demand of the charterers, but reserving the rights and claims of libelants on account of respondent’s breach of the charter-party, as aforesaid, by duly made protest, *issued bills of lading* to said charterers, to wit, respondent, wherein or whereby said respondent, or assigns, were mentioned as consignees of said cargo, *but which said bills of lading contained no reference to the demurrage previously incurred.*”

On the other hand, using the language of the Supreme Court in *Crossman v. Burrill*,

“In the case at bar (the *Crossman* case), the provision of the charter-party which *requires* ‘bills of lading to be signed *as presented, without prejudice* to this charter’, while it *obliges* the master to sign bills of lading *upon request* of the charterers, does not mean that the bills of lading, or the consignees holding them, shall be subject to all the provisions of the charter, but only that the obligations of the charterers to the ship and her owners are not to be affected by the bills of lading so signed.”

It was only because the bills of lading so *required by the charter-party*, and which, by the *terms of the*

charter-party the master was *obliged* to sign,, did not preserve to the ship-owner the remedy for the lien of demurrage provided in the charter-party, that the cesser clause was construed as inoperative. In and through the entire consideration of the case, it is apparent that it is the construction of the charter-party alone that is determinative of the right, the bill of lading itself being only the result of the requirements of the former instrument.

“The master signs ‘not exactly as agent of the charterer, but because he is bound to sign by reason of the charter-party’.”

Carver, Sec. 156.

“The provision that the master shall sign bills of lading is not a mere authority to him to do so, it is an agreement that he shall do so, for breach of which the owner is liable to an action by the charterer.”

Carver, Sec. 156.

“The common clause that the master shall ‘sign bills of lading as required by the charterer, without prejudice to the charter-party’, gives an express authority from the owner which appears to be, but is not unlimited. The provision that the charter-party is not to be prejudiced is rather a condition of the contract with the charterer than a limitation of the master’s authority. *It means that, notwithstanding any engagements made by the bills of lading, the contract between the parties to the charter is to stand unaltered.*”

Carver, Sec. 161.

These quotations indicate more clearly than the language of the Supreme Court both propositions contained in our quotation from that court, viz: (a) under

that provision of the charter in the *Crossman* case, the master is *bound* to sign *as presented*, and (b) “without prejudice” does not relieve him of that obligation, but only preserves the charter-party unaffected thereby.

On the other hand, in a case where the provision in the charter-party concerning the signing of bills of lading is the *same as in the case at bar*, the English Court of Appeals held that the master might have required such a reference in the bills of lading to the charter as would have preserved the lien for the chartered freight, and this was approved by the House of Lords.

We quote the following from *Carver*, 5th Ed., beginning at the bottom of page 227:

“On the other hand, in the later case of *Blankelow v. Canton Insurance Office*, (1889), 2 Q. B. 178, where the charter required the master ‘to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading’, it was held by the Court of Appeals that the master might have required such a reference in the bills of lading to the charter as would have preserved the lien for the chartered freight. The ship was chartered for a voyage for a lump sum. The bills of lading reserved freights on the goods shipped exceeding in the aggregate that lump sum. But on the voyage part of the goods were lost, and the bill of lading freights were therefore not enough to satisfy the chartered freight. In an action against insurers of the chartered freight, it was held that the loss, if any, was *due to the master’s omission to preserve the lien for that freight* against the goods which arrived. ‘In my opinion there is nothing in the charter-party which would have prevented this being done,

the clause as to signing bills of lading having reference only to the question at what rates of freight the bills of lading were to be given, and the clause has nothing to do with the form in which the bills of lading were to be taken * * * except as to the rate of freight the form was in the power of the plaintiffs.' And this view seems to have been approved in the House of Lords upon appeal."

We think this makes the distinction clear, and shows that the case of *Crossman v. Burrill*, upon which the libelants have heretofore relied, is not applicable to the facts of the present case.

How can it be that "the master's omission to preserve the lien" in his bill of lading, when "there is nothing in the charter-party which would have prevented this being done", can affect the construction of the latter instrument? So far as the *charter-party is concerned*, the lien is commensurate with the liability, and it was the master's act alone that deprived his owners of that lien.

It is well settled that the master has no power to alter the contract of charter-party, and if he has no power to alter it by an act of *commission*, he certainly has no power to alter it by an act of *omission*.

10. It is further claimed that the lien is ineffective because under the charter-party the charterer had the right to take or order, the cargo out of the possession of the shipowner at Callao before receiving either freight or demurrage.

The basis of this contention rests upon the provision of the charter-party that freight is payable "on the right and *full* delivery of cargo at final port of

discharge", with emphasis on the "full", and appeal is made to the language of this court in *Dewar v. Mowinkel*, where it was said:

"The lien for damages, like the lien for freight, is lost when the cargo is delivered to the consignee.

"The lien of the ship-owner for freight being but a right to retain the goods until the payment of freight, it is inseparably associated with the possession of the goods, and is lost by an unconditional delivery to the consignee."

And appellant says:

"On this ground the court held that the cesser clause was not operative *under the facts of that case.*"

But by consulting that decision it will at once be seen that the "facts of that case" do not fit the facts of this case. The basis of that decision was the fact

"that the master requested of Evans that the discharge be made in such a way as to protect his lien, but his request was not complied with. The master testified that he was required to discharge into a general coal pile * * * In any view of the evidence, the cargo passed out of the possession of the master, and went into the possession of a third party, the Western Fuel Company" (179 Fed. 362).

Immediately following this statement of facts by the court is the language quoted in appellant's brief.

In the present case there is no question of the manner of the discharge of the cargo. *Non constat* but that the ship-owner would have been permitted to make a

conditional delivery such as under the law would preserve his lien.

Moreover, the "full delivery" upon which so much stress is laid, only means complete discharge "*within reach of vessel's tackle*". By the express terms of the charter-party,

"Cargo shall be * * * delivered within reach of vessel's tackle" (Rec. p. 15).

We understand it to be a cardinal principle that the meaning of a decision of the court must be ascertained from the particular facts to which a legal principle is applied, and that different facts make different cases.

It will be also noted that under this same heading (Br. p. 33), the appellant states that

"W. R. Grace & Company were also the consignees of the cargo under the bill of lading",

for which he refers to the allegation of his libel, which was *not* the fact in the *Mowinkel* case. Yet one of the reasons the cesser clause was there held not applicable, was because the bill of lading "was in the hands of a stranger to the charter-party", 179 Fed. 363. Surely, the rule can not be a "double-ender" working both ways.

We think the foregoing considerations are sufficient to answer the claim made under this heading.

However, it appears to us further that in the case at bar the lien for demurrage is entirely disassociated

from the lien for freight. It is a separate and distinct agreement, and we are not concerned with whether or no a lien for freight can be preserved under the charter-party so long as the lien for demurrage can be preserved. There is no provision in the charter-party for delivery of the cargo before payment of demurrage, and there is nothing in the facts or terms of the charter-party that would prevent the master from holding the cargo until his demurrage is settled while postponing the settlement of his claim for freight to a later period.

11. The next allegation is that the lien is ineffective because respondent, as consignee of the ship, had control of discharge at Callao and the power to make the enforcement of the lien not only difficult, but impossible.

Under this head appellant says:

“The word ‘consignee’ signifies that the vessel, upon her arrival at Callao, was to be delivered into the *care and control of respondent* the charterer” (Br. p. 36).

In support of this claim, he cites two cases, neither one of which has the remotest application either to the subject-matter or to the principle here under consideration.

Upon this premise is based the conclusion that

“if in such a case the master had refused to deliver the cargo to the consignee, who satisfied *respondent* of his right to receive it, respondent’s agent, as general representative of the ship and ship owner, *could have ordered the master to de-*

liver it and could have prevented him from enforcing his lien”.

This is the ground of the contention that the lien is made ineffective and yet the very next sentence in the brief shows its futility, viz.:

“Even if it be admitted that respondent at Callao *would have had no legal right to give such an order to the master*, the fact still remains that under such conditions and with such a provision in the charter party, it could have been made very difficult, and practically impossible for the master to retain the cargo for the protection of his lien, had he otherwise such a right” (pp. 36 and 37).

Under this admission the proposition scarcely needs attention. Appellant practically concedes that no *legal right* to do such a thing is conferred upon the charterer or consignee of the vessel, and we hardly think the court can concern itself with such a remote possibility of difficulty so long as it be conceded that the legal right remains. It will be presumed that the legal right will be enforced. There is no human transaction in which some difficulties can not be conjured up, but commercial instruments must be reasonably enforced or all commerce is at an end.

But it is a gratuitous suggestion that the consignee, because he is consignee of the vessel, could or would have made it difficult or practically impossible for the master to retain his lien. It only illustrates how very far afield the appellant is compelled to go in the hope of finding some suggestion that might catch the attention of the court and move it to set aside or nullify this contract.

12. The next claim is that it is ineffectual because under the bill of lading no claim could be made against the consignees (Br. p. 37).

This suggestion is fully answered in the opinion of the court below. It is also fully treated by us on pages ante of this brief.

It is also inconsistent with the claim made by appellants that the *respondents* are both *charterers and consignees* under the bill of lading, and therefore liable as consignees, if not as charterers. Both positions can not be correct,—which one does he wish to tie to? The libel alleges that the respondent is also consignee under the charter-party (Art. VI, p. 125), to which we have already replied that that is immaterial in the case at bar, because he has not been sued on the bill of lading contract.

We have already taken the position that the charter-party and bill of lading are two separate and distinct contracts; that the charter-party fixes the question of liability on the part of the respondent with respect to demurrage; that the bill of lading, not containing any provision regarding demurrage, *in and of itself* fixes no liability upon the consignee, and hence, *independently of the provisions of the charter-party*, would fix no liability upon the respondent for demurrage.

On the other hand, if the respondent be both charterers and consignees under the bill of lading, the position would be the same as if the bill of lading also contained “an express condition providing for the payment of demurrage”, and so the respondent, *if sued*

on the bill of lading contract, might possibly be liable, because, having full and complete knowledge of the terms and conditions of the charter-party, they are not prejudiced by the failure to incorporate the condition in the bill of lading. This conclusion is based upon the reason of the rule which exempts consignees from such liability, namely, that the bill of lading is, at least, a quasi negotiable instrument, by reason of which an innocent purchaser without notice is protected.

But the respondents cannot be adjudged liable in this case as consignees, even though we accept the appellant's statement of facts, both because such legal liability does not exist under the terms of the charter-party, so to be incorporated into the bill of lading, and also because this is not an action against respondent based upon his liability under the bill of lading. On such a cause of action, he has not had his day in court. It is an entirely different cause of action, based upon a different contract from that now under consideration.

The fact, however, that the respondent has not been sued under the bill of lading, will not justify the objection which the appellants here make to the construction of the charter-party. Their contention is, "*no claim could be made against the consignees*" to which our answer is, "*no claim has been made against the consignees,*"—that is, they have not been sued upon that contract.

In making the foregoing suggestions we are not overlooking the provision of the charter-party, that the demurrage is "to be settled with the consignees,

the owners and captain *looking to their lien on the cargo for this purpose*'. We are only, in the foregoing, giving a "further answer" to appellant's point. It would be sufficient for us to rely on this latter clause which substitutes the lien for the liability of both charterer and consignee.

13. The next proposition urged by appellant is that respondent is liable for the damages as *consignee* because it is so *expressly stated in the cesser clause* upon which respondent relies (Br. p. 38).

If this be true, it is an additional answer to the proposition last above discussed, and it is none the less an answer to said proposition notwithstanding that we do not construe that particular term of the cesser clause as appellant construes it.

We have already considered the matter therein discussed. Appellant concludes because the provision provides that "demurrage is to be settled with the consignees", that they thereby become responsible in personam. He, however, deliberately closes his eyes to the last portion of the sentence, viz: "the owners and captain looking to their lien and the cargo for this purpose".

In reply to this suggestion, appellant says that "if the intention had been to restrict the ship owner to the remedy in rem, *as the only remedy*, it would have been easy to express such intention by clear words". This is a supremely hypercritical suggestion. We do not know what words could more clearly express the intention.

It is next said that the effect of our construction of the language will be to strike out of the clause the words: "All questions whether of demurrage or otherwise, to be settled with the consignees," and that the presence of these words makes our construction of the words forced and unnatural. We respectfully submit that the *criticism* is "forced and unnatural"; that no one of ordinary intelligence reading this language with honest intent can come to any such conclusion as contended for by appellant.

Nor do we see anything upon the face of the instruments, nor any allegations in the libel to indicate that the words "were inserted *by respondent* in the charter-party". Prima facie both parties are equally responsible for the language of the charter-party.

14. The next suggestion is that the additional words respecting the lien

"is only a statement of the reasonable or reasonableness of making such an agreement, pointing out to the ship owner that he is taking a small chance, as his claim against the consignee is *secured* by the lien on the cargo. No obligation is intended to be placed upon the ship owner by the added words", etc (pp. 40 and 41).

Can it be possible that appellant expects a court to adopt this view, when reading the entire sentence beginning with "vessel to have a lien on the cargo, etc.", down to and including "owners and captain looking to their lien on the cargo for this purpose"?

15. The next suggestion is that a construction confining the remedy to an action in rem will render the contract void "on the ground that such an agreement would be an attempted ouster of the court's jurisdiction", and that such a contract is "against public policy" and consequently void.

In support of this claim appellant cites *The Tampico*, 151 Fed. 689, "in which the writer was interested as proctor".

It would seem to be sufficient answer to this proposition that if it were the law as applied to cesser clauses, then no cesser clause, no matter what its terms may be, would be valid, and that the courts, in the innumerable cases wherein the cesser clause has been upheld, have all been wrong.

We have not the time, nor do we wish particularly to criticise the decision of Judge DeHaven in *The Tampico*, though we feel satisfied that it is not good law. It stands alone on the books and does not seem to have been followed in any subsequent case. It is, however, sufficient for our present purpose to point out (1) that this contract is not a contract covered by the provisions of the Harter Act; and (2) that it is *not* a provision wherein the parties agree to waive the *lien* (which was the point of that decision) but on the contrary, it is the waiver of "*all liability*" on the part of one of the contracting parties and the acceptance, in lieu thereof, of a lien upon the cargo. Surely, there is no "public policy" which prohibits one party from releasing another party from *liability* under his contract. Indeed, the cesser clause is very much like the

contract of novation, against which there is certainly no principle of public policy.

CONCLUSION.

We feel that in the foregoing we have followed the appellant with unnecessary *minutiae* into the numerous suggestions and objections that he has made, and it is not out of place for us to add that many of them are in their nature so finely drawn and hypercritical as to condemn his entire position. They are based upon the idea of a “*strict* construction of the contract”, but we respectfully submit that the idea of a “strict construction” is not one of emasculation.

As we said in the beginning, the court is bound to construe the contract in a reasonable manner, with a view of effectuating the purpose and intention of the parties, and is not at liberty to add to, or omit therefrom, any provision, or even any word.

We also take the liberty of submitting that, if we be correct in what we have hereinbefore suggested regarding the error into which we think the Supreme Court fell in adopting the English rule respecting the construction of the cesser clause, while recognizing that such error does not relieve this court from the duty of following the rule until the Supreme Court shall reverse it, we do think it should still place the court upon its guard against being “curious and subtle”, as Lord Hale expresses it, in endeavoring to so construe the contract as to bring it within such rule.

If we view appellant's argument from his résumé, there certainly is nothing in it to urge the court in that direction. That résumé contains the propositions:

- (1) That this is not a case of demurrage.
- (2) That after the cargo was on board charterers still had the power to make the lien valueless.
- (3) The respondent is also consignee, and hence liable; and,
- (4) The libelants had no lien on the cargo for the damage suffered by reason of matters arising before loading the cargo; and
the clause

That the owner and captain should look to their lien on the cargo for this purpose, was only intended to point out a remedy to which he could look for security.

The mere statement of the argument in the form of his résumé is sufficient for our purpose, and we respectfully submit that the decree sustaining the exception should be affirmed.

BY DEFAULT OF CHARTERERS.

We further contend that, independently of the construction to be placed upon the cesser clause in this contract, the order sustaining the exception to the libel, and hence the decree, must be affirmed, because in another respect the libel does not state a cause of action.

The second exception to said libel, is as follows (Rec. p. 128):

“That it is not alleged in said amended libel that said alleged failure to load the vessel within the time in said charter party provided was occasioned by the fault of said respondents or their agents.”

The allegation of the libel to which this exception is pointed is Article IV, page 124, which, after setting forth the performance of all conditions of said contract on the part of said libelants, proceeds:

“yet the said respondent by its own *default* did not load said ship within the thirty working lay days in said charter-party agreed upon” etc.

The charter-party provides with respect to the payment of demurrage (Rec. p. 15),

“for each and every day’s detention by the *fault* of the party of the second part, or agents, they agree to pay the said party of the first part demurrage at the rate of” etc.

It is our contention that “*fault*” and “*default*” describe two entirely different conditions.

As already decided by this court in *McLeod v. 1600 Tons of Nitrate*, 61 Fed. 851:

“There is in the use of the word ‘default’ no necessary implication of negligence. As used in such an instrument, it can mean only the non-performance of contract duty, a failure upon the part of one of the contracting parties to do that which he had contracted to do. The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unfore-

seen interruption or prevention of the act itself of loading or discharging, *not occurring through the connivance or fault of the charterers.*”

Following this expression of opinion, this court reviews the authorities, and in that connection quotes from *Thatcher v. Gas Co.*, 2 Lowell 361, a portion of which quotation is as follows:

“If the respondents do not furnish the wharf room, or any other means or appliances which they are to supply, it is not enough for them to prove that they have taken reasonable measures to procure them. In short, the default does not mean negligence, but a failure of contract on their part, unless it is caused by a direct and unavoidable vis major, or something like it.”

The foregoing is sufficient to illustrate our contention in the present case.

The libel alleges that the delay was due to respondents’ “default”, in other words, to a breach of his contract obligation, irrespective of whether it occurred “through the connivance or fault” or “negligence” of the charterers, which is a much broader liability than that imposed upon them by the agreement to pay for detention caused by their fault.

But by the contract in this case, their agreement to pay demurrage is limited to “detention by the fault” of the charterers.

It may very well be that there is a detention by “default” of the charterers, which is neither the result of “negligence” or “connivance” on the part of the respondents, and therefore a claim for detention by “de-

fault'' of charterers does not constitute a cause of action against them under this contract.

Dated, San Francisco,
November 3, 1916.

Respectfully submitted,

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